91-1945 (1)
No.____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

TRIANGLE INDUSTRIES, INC.,
a/k/a ANC HOLDINGS, INC.;
TRIANGLE PWC, INC.,
Petitioners,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, on behalf of
IDEAL MUTUAL INSURANCE COMPANY, in liquidation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit erred in deciding an issue of New Jersey law unaddressed by, but currently pending before, the Supreme Court of New Jersey in *Morton International, Inc. v. General Accident Insurance Co. of America* No. 34,341, (N.J. Sup.Ct. *certif. granted*, March 2, 1992), involving the interpretation of the pollution exclusion clause of a Comprehensive General Liability ("CGL") policy, in a manner which is diametrically opposed to the decision of the United States Court of Appeals for the First Circuit, *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992), thereby creating an inter-circuit conflict which requires this Court to accept jurisdiction and then stay all further proceedings pending the decision of the New Jersey Supreme Court in *Morton*?

2. Whether the United States Court of Appeals for the Fourth Circuit incorrectly predicted that the New Jersey Supreme Court would hold that the sudden and accidental exception to the pollution exclusion clause in a CGL policy applies to the "discharge" of contaminants, as opposed to the "pollution damage," as interpreted by New Jersey's trial and intermediate appellate courts in accordance with the standards announced by this Court in the cases of *Salve Regina College v. Russell*, __ U.S. __, 111 S.Ct. 1217, 1222, 113 L.E.2d 190 (1991) and *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.E.2d 886 (1967)?

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No.____

IN THE

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TRIANGLE INDUSTRIES, INC.,
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LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, on behalf of
IDEAL MUTUAL INSURANCE COMPANY, in liquidation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively, "Triangle" or "Petitioners"), respectfully request that a Writ of *Certiorari* be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on March 2, 1992.

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Fourth Circuit, *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), is reprinted in the Appendix hereto at A-1.

2. The Opinion of the United States District Court for the Northern District of West Virginia, *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, 765 F.Supp. 881 (N.D.W.Va. 1991), is reprinted in the Appendix hereto at A-17.

3. The Opinion of the West Virginia Supreme Court of Appeals deciding that New Jersey substantive law

applies in this matter, *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (W.Va. 1990), is reprinted in the Appendix hereto at A-28.

JURISDICTION

The Judgment and Order of the United States Court of Appeals for the Fourth Circuit, filed on March 2, 1992, affirmed the Judgment of the United States District Court for the Northern District of West Virginia, which held that under New Jersey law, CGL insurance policies which contain "original" pollution exclusion clauses do not provide coverage for "unintended environmental damage which allegedly continues to arise from past regular surface disposal in a landfill of the waste products of a standard manufacturing process," *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), A-3. The Mandate of the United States Court of Appeals for the Fourth Circuit took effect on March 23, 1992. Petitioners' Motion to Recall and Stay the Mandate of the United States Court of Appeals for the Fourth Circuit was filed on April 7, 1992. The Fourth Circuit's Order denying Petitioners' Motion was filed on April 24, 1992. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The outcome of this case will determine whether policy holders are entitled to insurance coverage under New Jersey law for the costs of cleaning up a superfund site located in Ohio, when the waste disposed of was declared by the federal government to be non-hazardous under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§6901, *et seq.* ("RCRA"), but which is currently regulated under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601, *et seq.* ("CERCLA") (effective December 1980), a federal law which did not become effective until after the disposal activities by Triangle had ceased.

Triangle was a company engaged in the fabrication of wire and cable line and owned a processing plant in Glen Dale, West Virginia. Triangle used a process of "pickling" the steel, which generated a waste product known as "lime-stabilized waste pickle liquor sludge" ("sludge" or "waste"). *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), A-16, A-3; *See also* 46 *Fed. Reg.* 17,202.

Between November, 1977 and October, 1980, the sludge was shipped to the Buckeye Landfill located outside St. Clairsville, Belmont County, Ohio, for disposal. A-3. Triangle engaged the services of independent contractors to transport the sludge to the landfill. A-3. Triangle itself did not dispose of the waste at the site.

The sludge was delisted from regulation under RCRA as being non-hazardous. *See* 46 *Fed. Reg.* 17,202 (temporary exclusion from regulation) and 49 *Fed. Reg.* 23,287 (adopting final rule). An analysis of Triangle's waste generated at its Glen Dale, West Virginia, facility found that:

> The constituents of concern in the waste are chromium and lead. EP extracts from sludge samples analyzed by [Triangle] show lead and chromium consistently well below the maximum EP toxicity levels. These low leakage levels indicate that the constituents are present in essentially an *immobile* form.

See 46 *Fed. Reg.* 17,202 (emphasis and brackets added).

The analysis of the waste showed that chromium and lead were immobile and would not leak out. Triangle had petitioned the United States Environmental Protection Agency ("U.S. EPA") to delist its sludge because the "sludge is environmentally stable and non-hazardous, and specifically that the sludge does not contain hazardous levels of chromium and lead, the constituents of concern, for which spent pickle liquor waste (K 062) was listed." *Id.* Accordingly, Petitioner believed its waste was safe for disposal in landfills. The U.S. EPA agreed and removed the sludge from regulation under RCRA.

40 C.F.R. 261.3(c)(2)(II). The sludge contained trace amounts of chemicals, however, which were regulated under CERCLA, 42 U.S.C. §§9601, *et seq.*, which became effective on December 11, 1980, *after* Triangle's disposal of the sludge at the Buckeye landfill had ceased.

The eight policies of insurance under which Triangle originally sought coverage included[1]: (1) one comprehensive general liability ("CGL") policy issued by Ideal Mutual Insurance Company ("Ideal Mutual") covering the period from January 1, 1981 to January 1, 1982; (2) two CGL policies issued by Liberty Mutual Insurance Company ("Liberty Mutual") covering the period from January 1, 1982 to January 1, 1984; (3) four CGL policies issued by Zurich Insurance Company ("Zurich") covering the period from January 1, 1984 to April 1, 1987; and (4) one claims-made policy issued by Zurich covering the period from May 15, 1984 to May 15, 1985.

Ideal Mutual was placed in liquidation on February 7, 1985. In accordance with *N.J.Stat.Ann.* §17:30A-12 (West 1985), the New Jersey Property Liability Insurance Guaranty Association ("NJPLIGA") is the primary insurance guaranty association against which Triangle has made claims.

Each of the relevant CGL policies contained both the broad general covenant to pay "all sums" for which Triangle may become legally obligated to pay, and the covenant to provide Triangle with a defense to any suit brought against it. The standardized policy language reads as follows:

> The company will pay on behalf of the insured all sums which the *insured* shall become legally obligated to pay as damages because of

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1. Only the policies described in categories one (1) and two (2) are the subject of this Petition. The policies issued by Zurich did not contain the "original" pollution exclusion clauses. Accordingly, the issues raised by this Petition do not involve the contracts of insurance issued by Zurich.

> Coverage A: *bodily injury*, or
> Coverage B: *property damage*,
> to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

A-34. (emphasis in original).

The term "occurrence" is defined under each of the CGL policies in the relevant part as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended* from the standpoint of the insured.

A-6-7. (emphasis in original).

The pollution exclusion clauses contained in the policies issued by Ideal Mutual and Liberty Mutual provide as follows:

> This insurance does not apply . . . to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this *exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

A-7. (emphasis added).

On or about October 15, 1980, the Ohio EPA conducted sampling of sludge located at the Buckeye Landfill and determined that the sludge was "toxic." A-17.

Triangle ceased its disposal activities on or about October 6, 1980. A-16.

The only evidence of record regarding Triangle's knowledge of the alleged hazardous nature of the waste indicates that Triangle thought the waste was not hazardous and, accordingly, believed that the waste would neither leach chemicals into the land, nor change from its essential earth-like composition:

> Based on the above analysis, this material may be classified as non-toxic, nonhazardous, non-liquid which could be classified as a solid, suitable for disposal in your landfill operations.

See A-42, Letter dated May 14, 1979, from Triangle to Cravat Coal Company; and 46 *Fed. Reg.* 17,202 (RCRA delisting petition showing Triangle considered the waste environmentally stable).

On or about December 7, 1984, Triangle was notified by the U.S. EPA that it was being designated a "potentially responsible party" ("PRP") pursuant to CERCLA in connection with the alleged environmental contamination of the Buckeye Landfill. A-17. On or about October 3, 1985, Triangle, along with other PRPs, executed an administrative consent order as required by the U.S. EPA and Ohio EPA for the cleanup of the landfill. A-17 and 33.

On or about September 8, 1983, the Buckeye Landfill was listed on the National Priorities List ("NPL") pursuant to Section 105 (8)(b) of CERCLA by publication in the Federal Register, at 48 *Fed.Reg.* 40658-40682 (1983). A-17. On or about March 7, 1985, counsel for Triangle placed all of Triangle's insurance carriers on notice of the claims asserted by the U.S. EPA arising out of the enforcement actions at the Buckeye landfill. A-4 and 18.

On April 13, 1988, Liberty Mutual filed the underlying action in the United States District Court for the Northern District of West Virginia seeking a declaratory judgment that it owed no duty to defend or indemnify

Triangle[2]. Triangle filed an answer, affirmative defenses and counterclaims on June 10, 1988. Liberty Mutual filed a reply to the counterclaim on July 27, 1988. *See* A-5.

On June 20, 1988, Triangle filed a third-party complaint against Employers Insurance of Wausau, a Mutual Company ("Wausau"), The New Jersey Property-Liability Insurance Guaranty Insurance Association, on behalf of Ideal Mutual Insurance Company, in liquidation ("NJPLIGA"), and Zurich Insurance Company ("Zurich"). Answers to the Third Party Complaint were filed by these parties on August 1, July 26, and August 4, 1988, respectively. From January 17, 1989 to May 19, 1989, the parties filed and exhaustively briefed cross-motions for summary judgment on the Complaint and the Third Party Complaint.

By Order dated July 5, 1989, the United States District Court for the Northern District of West Virginia certified the following two questions of law to the West Virginia Supreme Court of Appeals pursuant to W.Va. Code §§51-1A-1, *et seq.*: (1) Does West Virginia's substantive law apply to the interpretation of the insurance policies at issue; and (2) if so, do the insurance policies at issue give rise to a duty to defend and indemnify the insured by the respective insurers. The Supreme Court of West Virginia filed an opinion on February 21, 1990, holding that New Jersey law governed the interpretation of the insurance contracts at issue and remanded the matter to the United States District Court for the Northern District of West Virginia. *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (W.Va. 1990).

Thereafter, Triangle renewed its motions for summary judgment on the Complaint and the Third Party Complaint in the District Court. The insurers filed cross-motions for summary judgment. On March 12,

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2. Jurisdiction was conferred on the District Court by 28 U.S.C. §1332.

1991, the Honorable William Kidd, U.S.D.J., filed a Memorandum Opinion and Order granting summary judgment to Liberty Mutual, to Zurich and to NJPLIGA (on behalf of Ideal Mutual). *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, 765 F.Supp. 881 (N.D.W.Va. 1991), reprinted at A-15. This Order was made final by an Order dated July 5, 1991, from which Triangle appealed. A-26. The July 5, 1991, Order dismissed Wausau from the case following a settlement reached between Wausau and Triangle.

The District Court determined that Petitioners did not "intend or expect" to cause property damage, that there was an "occurrence" within the meaning of the insurance policies in question, that "property damage" had occurred during that period and that clean up costs are "damages" – all within the meaning and within the policy periods of the CGL policies. *Id.*, reprinted at A-20-21. Although the District Court decided that Triangle did not intend or expect the damage, it nevertheless denied coverage because it found that Triangle both intended and expected to have the materials transported to and deposited in the Buckeye Landfill. *Id.*, at A-22.

On July 31, 1991, Triangle filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, which appeal was argued before the Fourth Circuit on December 3, 1991. A-2. The principal issue on Appeal was whether the "sudden and accidental" exception to the pollution exclusion clause applied to the *"damages"* caused by the release, or to the *discharge* of the pollutants. Respondents did not cross-appeal from the decision of the District Court. Jurisdiction in the United States Court of Appeals for the Fourth Circuit was conferred by 28 U.S.C. §1291.

On March 2, 1992, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the Northern District for West Virginia and held that under New Jersey law, the CGL policies which contain "original" pollution exclusion clauses do not provide coverage for

"unintended environmental damage which allegedly continues to arise from past regular surface disposal in the landfill of the waste products of a standard manufacturing process." *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 957 F.2d 1153 (4th Cir. 1992), reprinted at A-1. Coincidentally, on March 2, 1992, the same day of the filing of the Fourth Circuit's opinion, the New Jersey Supreme Court granted Certification to decide the identical issue of New Jersey law in the case of *Morton International, Inc. v. General Accident Insurance Co. of America*, Docket No. 34,341 (N.J. Sup.Ct. *certif. granted*, March 2, 1992).

On March 23, 1992, the United States Court of Appeals for the Fourth Circuit filed its Mandate effectuating its Opinion and Order of March 2, 1992. A-39. On March 24, 1992, the United States Court of Appeals for the First Circuit decided the case of *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. Mar. 24, 1992), which involved an appeal from an Order of a Rhode Island District Court granting summary judgment in favor of an insurance company, based upon the application of New Jersey law to the identical pollution exclusion clause analyzed by the Fourth Circuit in this case. Contrary to the Fourth Circuit's Opinion and Order, however, the First Circuit reversed the District Court and held that the sudden and accidental exception to the pollution exclusion clause did not bar coverage for the insured.

Petitioners filed a Motion to Recall and Stay the Mandate with the Fourth Circuit on April 7, 1992, on the grounds that there existed an inter-circuit conflict between the First and the Fourth Circuit on an identical issue of New Jersey state law, which would be resolved by the New Jersey Supreme Court's decision in *Morton, supra*. The Motion was denied by Order of the United States Court of Appeals for the Fourth Circuit, without opinion, on April 24, 1992, A-40, leaving Petitioners no recourse other than to seek review in this Court, a

course of action which Respondent, Liberty Mutual, suggested Triangle should follow in its Opposition to Petitioners' Motion to Recall and Stay the Fourth Circuit's Mandate. A-57.

REASONS FOR GRANTING RELIEF

I. IN LIGHT OF THE INTER-CIRCUIT CONFLICT CREATED BY THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE AND THE DECISION OF THE FIRST CIRCUIT IN *CPC INTERNATIONAL, INC. v. NORTHBROOK EXCESS AND SURPLUS INSURANCE CO.*, AS WELL AS THE DECISION OF THE NEW JERSEY SUPREME COURT IN *MORTON INTERNATIONAL, INC. v. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA*, TO DECIDE THE IDENTICAL STATE LAW QUESTION ADDRESSED BY THE FOURTH AND FIRST CIRCUITS, THIS COURT SHOULD GRANT THE PETITION FOR *CERTIORARI* AND STAY THE PROCEEDINGS IN THIS MATTER PENDING THE DECISION OF NEW JERSEY'S HIGHEST COURT

A. PRIOR DECISIONS OF THIS COURT DICTATE THAT, UNDER THESE CIRCUMSTANCES, THE PETITION FOR THE WRIT OF *CERTIORARI* SHOULD BE GRANTED.

Review by this Court on writ of *certiorari* is not a matter of right, but of judicial discretion. *Sup. Ct. R.* 10.1. A petition for a writ of *certiorari* will be granted only when there are special and important reasons therefor. *Id.* The Rules of this Court set forth the factors that will be considered in deciding whether or not to grant a petition for *certiorari*, including, but not limited to, "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." *Sup. Ct. R.* 10.1(a). The decision of this Court in the case of *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860 (1938), which interprets this rule, held that:

> Since jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order "to secure uniformity of decision," a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely a corollary to a permissible difference of opinion in the state courts. The rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Id. at 861 (citations omitted). *Ruhlin* involved a suit by New York Life Insurance Company against John G. Ruhlin and others, to rescind the disability and double indemnity provisions of life insurance policies, requiring the court to engage in insurance contract interpretation under applicable state law. *Id.* at 860.

Although this Court declined to address the issue of state law presented in *Ruhlin*, it remanded the cause to the District Court, so that it might decide the relevant issues of state law, stating that "no decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts." *Id.* at 861. Unlike *Ruhlin*, a decision by this Court in the instant case to grant the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit and stay the proceedings pending the decision of the New Jersey Supreme Court in *Morton* interpreting the "sudden and accidental" exception to the pollution exclusion clause in CGL policies would not only reconcile the conflict between the First and Fourth Circuits, it would facilitate a fair and equitable resolution of this important issue of state law for the parties to this action.

Moreover, it would be anomalous and unfair were Liberty Mutual to prevail in this case on this issue and lose in *Morton* based upon the fortitutous circumstance that the Fourth Circuit rendered its opinion in this case *before* the New Jersey Supreme Court decided the identical issue in *Morton*. Such a result would fly in the face of the governing principle that like cases should be decided based upon a uniform principle of law.

Accordingly, we respectfully request that this Court grant the Petition for a Writ of *Certiorari* and stay these proceedings, pending the New Jersey Supreme Court's decision on this issue, or, in the alternative, to recall and stay the Mandate of the United States Court of Appeals for the Fourth Circuit, pending the New Jersey Supreme Court's decision in *Morton*, so that an appropriate motion to reconsider, modify or amend the Order can be filed with the Fourth Circuit.

B. IN THIS CASE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED THE IDENTICAL ISSUE OF NEW JERSEY LAW IN A MANNER DIAMETRICALLY OPPOSED TO THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, THEREBY CREATING AN INTER-CIRCUIT CONFLICT WHICH CAN BE RESOLVED BY GRANTING THIS PETITION FOR *CERTIORARI*.

On March 24, 1992, the United States Court of Appeals for the First Circuit applied and interpreted New Jersey law involving the identical "sudden and accidental" exception to the pollution exclusion clause in CGL policies, in the case of *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992). As was required of the United States Court of Appeals for the Fourth Circuit in the case below, the First Circuit was forced to decide the same issue of New Jersey state law involving the interpretation of the "sudden and accidental" exception to the pollution exclusion clause, with no guidance from New

Jersey's highest court. In *CPC International*, however, the First Circuit reached a conclusion that was directly at odds with the Fourth Circuit's holding in this case. The "inter-circuit" conflict that was created by the Fourth Circuit's decision in this case and the First Circuit's decision in *CPC International* involves a critical issue of contract interpretation and insurance coverage in the environmental context which should be resolved by the New Jersey Supreme Court so that all parties similarly situated receive fair and uniform treatment. As Judge Campbell, in his concurring opinion in *CPC International*, stated:

> This case clearly demonstrates how unfortunate it is that New Jersey lacks a certification law or rule. It should be, but alas is not, possible for us to certify this important question to the State's highest Court. If we could do so, all guesswork would be eliminated. As the United States Supreme Court has noted, certification "saves time, energy, and resources and helps build a cooperative judicial federalism."

Id. (citing Lehman Bros. v. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974)). In order to effectuate the policy behind this Court's holding in *Lehman Bros. v. Schein*, *supra*, this Court should seize the opportunity to allow the highest Court of New Jersey to decide this important issue of insurance coverage under New Jersey law and have the issue resolved as if a certification procedure had been available.

It would be unjust to deprive Petitioners of the benefit of the New Jersey Supreme Court's interpretation and application of its own law. In *Morton*, the New Jersey Supreme Court will be deciding this critical issue in the near future. Accordingly, this Court should grant Triangle's Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit, and then stay further proceedings pending the New Jersey Supreme Court's decision in *Morton*.

In *CPC International*, 1992 U.S. App. LEXIS 5342 at 16, the First Circuit held that the "sudden and

accidental" exception to the pollution exclusion clause in the CGL policy means "unexpected and unintended," and thus concluded that under New Jersey law, given facts identical to the instant case, the coverage issue should be resolved in the favor of the insured. In this case, the Fourth Circuit denied coverage on the identical facts and policy language. Respondent, Liberty Mutual, in *Liberty Mutual Insurance Co.'s Opposition to Petitioners' Motion to Recall and Stay the Mandate of the United States Court of Appeals for the Fourth Circuit* stated that:

> To the extent that there is any inconsistency between the *CPC International* decision and this Court's March 2, 1992 judgment, it is the role of the United States Supreme Court to determine which decision is correct. Pursuant to Supreme Court Rule 13, the period for Triangle to petition for certiorari has not expired. Triangle will thus not suffer injustice if this Court's mandate remains in place.

A-57. Thus, Petitioners and Respondent, Liberty Mutual, are in agreement that the resolution of this "intercircuit" conflict is within the province of this Court and, hence, the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit should be granted.

C. THE NEW JERSEY SUPREME COURT'S DECISION IN *MORTON INTERNATIONAL, INC. v. GENERAL ACCIDENT INSURANCE CO. OF AMERICA*, WILL ONCE AND FOR ALL, RESOLVE THE INTERCIRCUIT CONFLICT BETWEEN THE FOURTH AND FIRST CIRCUITS. ACCORDINGLY, THIS COURT SHOULD GRANT THE PETITION, STAY ALL FURTHER PROCEEDINGS IN THIS CASE, AND AWAIT THE NEW JERSEY SUPREME COURT'S DECISION IN *MORTON*.

On March 2, 1992, the Supreme Court of New Jersey granted Morton International's Petition for Certification, A-43, in the case of *Morton International, Inc.*

v. General Accident Insurance Co. of America, No. 34, 341, on appeal from the decision of the Appellate Division of the Superior Court of New Jersey in *Morton International, Inc. v. General Accident Insurance Co. of America*, No. A-895-89T3 (App. Div. October 2, 1991), decided October 2, 1991, which contained a number of insurance coverage issues.

The Cross-Petition for Certification of Defendants-Respondents, Insurance Company of North America, American Home Assurance Co., Liberty Mutual Insurance Company, Underwriters at Lloyd's London, and London Markets Insurance Companies, A-50, was also granted by Order of the New Jersey Supreme Court, dated March 2, 1992. A-53. The Cross-Petition, in which Respondent, Liberty Mutual, joined, specifically requested that the issue of the interpretation of the "sudden and accidental" language in the exception to the pollution exclusion clause of the CGL policies be reviewed and decided. A-50.

In fact, the Cross-Petitioners in *Morton*, including Liberty Mutual, Respondent in this case, specifically emphasized the need for the New Jersey Supreme Court to address the identical issue raised in this case, relating to the pollution exclusion clause and its sudden and accidental exception, the resolution of which would concomitantly settle the question which created the intercircuit conflict between the Fourth and First Circuits. In asking the New Jersey Supreme Court to review the pollution exclusion and affirm the Appellate Division's holding in *Morton*, Liberty Mutual and its co-cross-petitioners stated:

> At the outset, Respondents emphasize that the Appellate Division correctly decided that there was not coverage for the underlying claims because there was no accident or occurrence. However, in doing so, the Appellate Decision declined to correct its prior erroneous decisions with respect to the pollution exclusion, and indeed, the Appellate Division reaffirmed its prior rulings on this exclusion.

> These prior erroneous decisions need to be corrected by this Court.
>
> Respondents [Liberty Mutual] ask this Court to address the "pollution exclusion" and, in particular, *to rule* that the *pollution exclusion applies to the discharge of pollutants and not to the damage that results from a discharge*.
>
> * * * * *
>
> Notwithstanding, lower courts of this state have continued to follow the outmoded precedent of the Appellate Division with respect to the pollution exclusion, which precedent is contrary to the view of the substantial majority of jurisdictions to have addressed the issue. In fact, the Respondents in this appeal asked the Appellate Division to correct these prior rulings; the Appellate Division declined to do so, but expressly left it for this Court to clarify the law.

Cross-Petition for Certification to the New Jersey Supreme Court of Liberty Mutual, A-50. (emphasis and brackets added).

Petitioners argued before the Fourth Circuit that the decisions of New Jersey's trial and intermediate appellate courts necessitated the reading of the "sudden and accidental" language such that it would be applied to the "damage" caused by the pollution, and not to the "discharge." Conversely, Liberty Mutual and its Co-Cross-Petitioners in *Morton* have asked the New Jersey Supreme Court "to rule that the pollution exclusion clause applies to the *discharge* of pollutants and not to the *damage* that resulted from the discharge." A-50. Hence, Liberty Mutual Insurance Company, Respondent in this case and Cross-Petitioner in *Morton*, admits and acknowledges that the very same issue is critical in both cases and is of great significance for insurers and insureds alike throughout the United States.

As recently noted by the Appellate Division in the case of *Diamond Shamrock Chemical Co. v. Aetna Casualty & Surety Co.*, No. A-694-89T1, 1992 WL 89112

(N.J. App. Div. Apr. 6, 1992), there is a considerable "degree of disarray in the decisional treatment"[3] of this question throughout the Nation[4], but concluded that "other than noting the litigation explosion that has been generated by the ambiguous wording of the pollution exclusion, we need not further address the issue." *Id.* at 45.

It is logical that a decision by the New Jersey Supreme Court construing the pollution exclusion clause should be applicable to both the instant case, as well as *Morton*. It would be anomalous and unfair if Liberty Mutual and Triangle were deprived of the New Jersey Supreme Court's guidance in this case when Liberty Mutual has sought such guidance directly from the Supreme Court of New Jersey in the *Morton* case. Accordingly, this Court should grant the Petition for a Writ of *Certiorari* and allow the final determination of the issue by the New Jersey Supreme Court in *Morton* to settle this important environmental insurance coverage dispute between Triangle and its insurers in the instant case. To do otherwise, we respectfully submit, would be manifestly unjust. In light of the granting of the Cross-Petition for Certification by the New Jersey Supreme Court in *Morton*, the First Circuit's decision in *CPC International, Inc.* and prior rulings of New Jersey's lower courts, it is critical that this Court accept jurisdiction over this matter.

Indeed, the First Circuit's decision of March 24, 1992 in the case of *CPC International, Inc. v. Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, which involved an appeal from an Order of a Rhode Island District Court granting summary judgment in favor of an insurance company, based upon the application of New Jersey law to the identical pollution

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3. *Id.* at 38 (quoting *Vantage Dev. Corp., Inc. v. American Env. Tech. Corp.*, 251 N.J. Super 516, 531 (Law Div. 1991))

4. Indeed, one of the many cases noted by the Appellate Division was this very case. *Diamond Shamrock* at 41.

exclusion clause addressed by the Fourth Circuit in this case, compels this Court to accept jurisdiction. The First Circuit, in reversing the district court and deciding in favor of coverage for the insured, relied upon many of the same cases upon which Petitioners rely and establishes that reasonable minds can differ as to the resolution of the coverage issue. Regardless of whether the decision of the New Jersey Supreme Court in *Morton* determines that the Fourth Circuit, or the First Circuit, correctly predicted what the New Jersey Supreme Court's determination of this insurance issue would be, it is in the interest of justice, fairness and equity for this Court to accept jurisdiction, grant the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit, and ultimately stay all further proceedings pending the decision of the New Jersey Supreme Court in *Morton*.

II. UNDER NEW JERSEY LAW, THE SUDDEN AND ACCIDENTAL EXCEPTION TO THE POLLUTION EXCLUSION CLAUSE IN A COMPREHENSIVE GENERAL LIABILITY ("CGL") POLICY APPLIES TO THE "POLLUTION DAMAGE," RATHER THAN TO THE "DISCHARGE" OF THE CONTAMINANTS. THEREFORE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT MISAPPLIED THE STANDARDS ANNOUNCED BY THIS COURT IN *SALVE REGINA COLLEGE V. RUSSELL*, AND *C.I.R. V. BOSCH'S ESTATE*, THEREBY RESULTING IN AN ERRONEOUS PREDICTION AS TO HOW THE NEW JERSEY SUPREME COURT, THE FINAL ARBITER OF NEW JERSEY STATE LAW, WOULD DECIDE THIS QUESTION.

A. FEDERAL COURTS ARE BOUND BY THE DECISIONS OF NEW JERSEY'S TRIAL AND INTERMEDIATE APPELLATE COURTS WHICH HAVE PREVIOUSLY ADDRESSED THIS ISSUE OF INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS UNDER NEW JERSEY LAW.

This case is to be decided based upon New Jersey's substantive law.[5] Petitioners contend that there is no doubt that the New Jersey Supreme Court, when faced with the issues raised in this case, will hold that Petitioners are entitled to coverage under each of the insurance policies at issue.

In the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938), this Court made it clear that the federal courts must *predict* how the New Jersey Supreme Court would decide this case, not how the highest courts of the states or other federal courts might decide this case. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1226, 113 L.Ed.2d 190 (1991). (J. Rehnquist dissenting on other issues.) Both *Erie* and *Salve Regina* interpret 28 U.S.C. §1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

This statute was formerly codified at 28 U.S.C. §1725.

In predicting how New Jersey's Supreme Court would decide this case, a federal court should examine the following factors: (1) decisions of the New Jersey Supreme Court in related areas of law; (2) decisions of intermediate and lower courts of the State of New Jersey; (3) decisions of the federal courts interpreting New Jersey law; (4) decisions of other jurisdictions on the "majority" rule; (5) law review commentaries and restatements of law; and (6) other relevant data. *See Grantham and Mann, Inc. v. American Safety Products,*

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5. The West Virginia Supreme Court of Appeals, in responding to certified questions from Judge Kidd of the United States District Court for the Northern District of West Virginia in this case, concluded that under West Virginia's conflict of law rules, New Jersey law would govern the interpretation of these insurance contracts. *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 380 S.E.2d 562 (W.Va. 1990).

Inc., 831 F.2d 596, 608 (6th Cir. 1987); *Gruber v. Owens-Illinois Inc.*, 899 F.2d 1366 (3d Cir. 1990).

It would be inappropriate for a federal court to fail to apply New Jersey law as it finds it, even if the federal court might consider a contrary ruling to be a better resolution of the issues presented:

> [O]ur Judicial chore is to "determine the rule that the North Carolina Supreme Court would probably follow, not fashion a rule which we, as an independent federal court, might consider best."

Kline v. Wheels by Kinney, Inc., 464 F.2d 184 (4th Cir. 1972), *quoting from Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469, 472 (4th Cir. 1963).

The *Erie* doctrine of applying state law in diversity cases furthers the twin aims of: (1) discouraging forum-shopping and (2) avoiding the inequitable administration of the laws. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1222, 113 L.Ed.2d 190 (1991) quoting *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965). The Supreme Court of Appeals of West Virginia has previously determined, in answering certified questions posed by Judge Kidd, that New Jersey law should be applied. *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (1990). Accordingly, a federal court deciding the relevant coverage issue should be deciding that issue no differently than if it were pending in the state courts of New Jersey. Any contrary result would reward forum shopping and undermine the integrity of the concurrent jurisdiction of the federal and state systems.

To effectuate the twin goals of the *Erie* doctrine, the Fourth Circuit was required to review the District Court's determination of New Jersey state law, *de novo*, and without giving deference to the District Court's conclusions regarding New Jersey state law. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1222, 113 L.Ed.2d 190 (1991). There should not be a "dual system of enforcement of state-created rights in

which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* at ___, 111 S.Ct. at 1222.

It is important to note that in the absence of persuasive evidence to the contrary, the federal courts are bound by decisions of the lower courts of a state which have addressed the matters in question. *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 463, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). In fact, the Fourth Circuit's own decision in *Hupman v. Cook*, 640 F.2d 497 (4th Cir. 1981) made it clear that in evaluating state law:

> [I]t is well to remember that, in this diversity action, the expressions of the Virginia courts are *due great deference*. If we can discover the answer they would give to the questions, it must control, regardless of our personal predilections for a contrary concept.

Id. at 497. (emphasis added).

Accordingly, this Court and the federal courts below are bound by the decisions of the New Jersey courts regarding the interpretation of the sudden and accidental exception to the pollution exclusion clause in a Comprehensive General Liability ("CGL") policy and its application to the "discharge of" contaminants, as opposed to the "pollution damage." Neither the United States Court of Appeals for the Fourth Circuit, nor the United States District Court for the Northern District of West Virginia, analyzed New Jersey State law in accordance with the standards set forth in the cases of *Salve Regina* and *Bosch*. Had the District Court and the Court of Appeals properly applied the rules of these cases, they would have decided in favor of Petitioners.

B. THE DECISIONS OF NEW JERSEY'S TRIAL AND INTERMEDIATE APPELLATE COURTS REQUIRE THAT THE COVERAGE ISSUE IN THE INSTANT CASE MUST BE RESOLVED IN FAVOR OF THE PETITIONERS.

The District Court in this case properly concluded that Petitioners: (1) did not "intend or expect" to cause

property damage; (2) that there was an "occurrence" within the meaning of the policies in question; (3) that "property damage" had occurred during that period; and (4) that the clean-up costs were "damages" – all within the meaning and within the policy periods of the Comprehensive General Liability ("CGL") policies issued by Ideal Mutual and Liberty Mutual. Neither Petitioners nor Respondents sought review of these issues decided by the District Court. The error of the courts below involves the application of the relevant New Jersey law to the interpretation of the standard pollution exclusion clause. The policy provision to be interpreted in the relevant CGL policies states that:

> This insurance does not apply . . . to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*.

A-31. (emphasis added).

New Jersey law, as expressed by the New Jersey Supreme Court, is well settled regarding the general standards of interpreting insurance policies. The polestar of insurance contract interpretation under New Jersey law is the effectuation of the reasonable expectations of the policyholders. *Meier v. New Jersey Life Ins. Co.* 101 N.J. 597, 612, 503 A.2d 862 (1986); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305, 208 A.2d 638 (1965) (holding that insurance policy language should be interpreted strictly against the insurer and where several interpretations are permissible, the New Jersey Supreme Court has chosen the one most favorable to the policyholder); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 482, 170 A.2d 22 (1961) (holding that the New Jersey Supreme Court will not allow

technical encumbrances or hidden pitfalls from providing coverage and that policyholders should be afforded coverage to the full extent that any fair interpretation will allow); *Broadwell Realty Services, Inc. v. Fidelity and Casualty Co.*, 218 N.J. Super. 516, 524, 528 A.2d 76 (App. Div. 1987). Insurance contracts are considered "contracts of adhesion" because they are prepared by the company's experts who are learned in the law of insurance. *Meier*, *supra*, 101 N.J. at 611-612; *Mazzilli v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. 1, 7, 170 A.2d 800 (1961) (holding that where the controlling language of an insurance policy will support two meanings, one favorable to the insurer and the other favorable to the insured, the interpretation sustaining coverage must be applied); *Broadwell Realty*, *supra*, 218 N.J. Super. at 523-524.

The New Jersey Supreme Court has declared that the interpretation of insurance contracts be guided by the principle that "doubts as to the existence or extent of coverage must generally be resolved *in favor of the insured*." *Mazzilli*, *supra*, 35 N.J. at 8; *Broadwell Realty*, *supra*, 218 N.J. Super. at 524 (emphasis added). Where several interpretations of policy language are permissible, New Jersey courts have chosen the one most favorable to the policyholder. *Allen*, 44 N.J. at 305; *Broadwell Realty*, *supra*, 218 N.J. Super. at 525. The New Jersey Supreme Court has even gone so far as to declare that *unambiguous* policy language may be interpreted *contrary to its plain meaning* if this would fulfill the reasonable expectations of a policyholder in purchasing such insurance. *See Werner Industries, Inc. v. First State Ins. Co.*, 112 N.J. 30, 35-36, 548 A.2d 188 (1988).

C. UNDER NEW JERSEY LAW, THE POLLUTION EXCLUSION CLAUSE'S EXCEPTION FOR "SUDDEN AND ACCIDENTAL" POLLUTION HAS BEEN INTERPRETED TO BE A RESTATEMENT OF THE DEFINITION OF "OCCURRENCE" AND TO PROVIDE INSURANCE COVERAGE FOR THE UNINTENDED RESULTS OF INTENTIONAL ACTS.

New Jersey's trial and intermediate appellate courts have interpreted the "sudden and accidental" language contained in the pollution exclusion clause to apply to the pollution *damage*, rather than to the *discharge, dispersal, release or escape of a contaminant*. *Broadwell Realty Services, Inc. v. Fidelity and Casualty Co.*, 218 N.J. Super. 516, 524, 528 A.2d 76 (App. Div. 1987). New Jersey's Appellate Division has interpreted the pollution exclusion's exception for "sudden and accidental" pollution to provide coverage for the intentional disposal of waste that resulted in unintended and unexpected pollution. Only an active and deliberate polluter who knew its waste was hazardous and would leak or leach out of a landfill will be denied coverage. This reading of the sudden and accidental exception to the pollution exclusion clause is confirmed by the decision of New Jersey's Appellate Division in *Broadwell Realty*:

> [D]ecisional law in New Jersey and elsewhere has tended to interpret the pollution exclusion and, more particularly, the "sudden and accidental" exception as "simply a restatement of the definition of 'occurrence' - that is, that the policy will cover claims where the injury was 'neither expected nor intended.'" It is a reaffirmation that coverage will not be provided for expected and hence avoidable results.
>
> We agree with this analysis.

Broadwell Realty at 534-535, quoting *Jackson Township Municipal Utilities Authority v. Hartford Acc. & Indem. & Co.*, 186 N.J. Super. 156, 164, 451 A.2d 990 (Law Div.

1982). (Other citations omitted). The trial court in *Jackson Township* held that:

> Viewed from the standpoint of the Municipal Utilities Authority, the function of depositing the waste may have been intentional but it was never expected or intended that the waste would seep into the aquifer resulting in damage and injury to others. An ambiguity thus exists. Alternative language in the clause to indicate that the act of depositing, if intentional, would exclude coverage regardless of whether the pollution is expected or intended, would have put the matter beyond reasonable question.

186 N.J. Super. 156, 164-5 (Law Div. 1982). Merely causing waste to be deposited off-site does not place a generator of waste in the class of those who expect or intend that the disposal of their waste will result in injury or damage. Given that Petitioners thought the wastes were non-toxic as reflected in Petitioners' letter of May 14, 1979, A-42, it is clear that Petitioners never expected or intended the shipment of its waste sludge to the Buckeye Landfill to cause any damage.

Disposing of waste through independent waste haulers further removes a company from expecting or intending injury or damages to occur. In *CPS Chemical Co. v. Continental Ins. Co.*, 199 N.J. Super. at 558 (Law Div. 1984), *rev'd on other grounds*, 203 N.J. Super. 15 (App. Div. 1985), the insured sought coverage under its insurance policies for claims made against it by the City of Philadelphia for the allegedly illegal dumping of toxic waste at a City dump. *Id.* at 562. CPS had turned over its waste to a hauler called "ABM" which proceeded to dispose of the waste at a dump in Philadelphia. *Id.* Among the claims asserted against CPS Chemical were violations of CERCLA. *Id.* These facts are essentially the same as those in the present case in which the Petitioners turned waste over to hauling companies. *See* A-3. The Law Division Judge in *CPS Chemical* concluded that there would be coverage for the unintended results

of intentional acts, but there would not be coverage for the intended results of intentional acts. *Id.* at 565. In other words, if a hauler improperly disposed of waste such that a release of toxic chemicals resulted and the release of the toxic chemicals was not intended by the insured, there would be coverage. *Id.*

Although the District Judge in this case concluded that Petitioners intentionally disposed of the waste in the sense that they knowingly sent the sludge to the Buckeye Landfill, he recognized that Petitioners did not expect or intend that its waste would cause pollution. A-22.

One of the earliest New Jersey cases which addressed the issue of insurance coverage for environmental claims was *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977). *Lansco* was the law in New Jersey at the time these policies of insurance were *issued,* a factor which bears emphasis. Indeed, at the time that Triangle *shipped* the sludge to the landfill in this case, November, 1977 to October, 1980, *Lansco* was the law in New Jersey. Moreover, when each of the subject policies was issued containing the standard pollution exclusion clause that "sudden and accidental" releases were covered by CGL insurance, the law of New Jersey, which is to be used to interpret the meaning of the policies in question, required that the phrase "sudden and accidental" be interpreted to mean "unexpected and unintended" from the standpoint of the insured. Accordingly, Triangle's reasonable expectations, the polestar of insurance policy interpretation under New Jersey law[6], were certainly that such claims would be covered by these insurance policies as interpreted by the Court in *Lansco*. The *Lansco* Court found specifically that the words of

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6. *Meier v. New Jersey Life Insur. Co.*, 101 N.J. 597, 612, 503 A.2d 862 (1986).

the policy must be interpreted in accordance with their plain, ordinary meaning - not in any technical or specialized way:

> Words used by the insurer must be interpreted in accordance with the plain, ordinary and commonly understood meaning of the language employed.

Id. at 281-282. The *Lansco* Court went on to find the terms "sudden" and "accidental" meant "unexpected" and "unintended." *Id.* at 282. The Court went further to conclude that the spill of the oil, which was not expected or intended by the insured, was covered:

> Further, under the definition of "occurrence" contained in the policy whether the occurrence is accidental must be viewed from the standpoint of the insured, and since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.

Id. at 282. *Lansco* would clearly inform a prospective purchaser of insurance that under New Jersey law, "sudden and accidental" means "unexpected and unintended." Therefore, under the uncontroverted facts of this case, Petitioners neither expected nor intended any environmental damage, and thus should be afforded coverage under the CGL policies.

That this reading of the sudden and accidental exclusion to the pollution exclusion clause of the CGL policies would be endorsed by the New Jersey Supreme Court is indicated by that Court's reliance upon *Lansco* in *State Dept. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150 (1983), in which the court held that strict liability under *Rylands v. Fletcher*, L.R. Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1888), applied in toxic tort cases in New Jersey. *See State Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 494, 495, 468 A.2d 150 (1983)

(citing *Lansco* for support). Numerous other court decisions and law review articles have cited *Lansco* in support of finding "sudden and accidental" to mean "unexpected and unintended." *See SL Industries v. American Motorists*, 248 N.J. Super. 458, 465, 591 A.2d 677 (App. Div. 1991), holding that "coverage will not be provided for intended results, but will be provided for the unintended and unforeseen results of an intentional act," *citing Ambassador Insurance Company v. Montes*, 76 N.J. 477, 388 A.2d 603 (1978), in which the Supreme Court of New Jersey found coverage under the language of a CGL policy where the insured had been convicted of arson.

The "sudden and accidental" language means "unexpected and unintended" under New Jersey case law. Petitioners allegedly intentionally disposed of the sludge by means of hiring a waste handler to transport it to a landfill, but, as was found by the District Court and affirmed by the Court of Appeals, Petitioners neither expected nor intended that the waste would cause pollution. Thus, under the current law in New Jersey, the Fourth Circuit should have found that Petitioners had insurance coverage under the CGL policies in issue. It is probable that the New Jersey Supreme Court will adopt the *Lansco* analysis and interpret the language to apply to the facts of this matter. At present, *Lansco* is the law of New Jersey.

Ironically, on March 2, 1992, the day on which the United States Court of Appeals for the Fourth Circuit filed its decision and order in this case, the New Jersey Supreme Court granted certification on this exact issue of New Jersey law, involving the interpretation and application of the "sudden and accidental" exception to the original pollution exclusion clause contained in CGL policies in the case of *Morton International, Inc. v. General Accidental Insurance Co. of America*, No. 34,341, (N.J. Sup.Ct. *certif. granted*, March 2, 1992). Another irony is that Respondent, Liberty Mutual, was

among the parties in *Morton*, who sought review of this issue by the New Jersey Supreme Court.

The decision of the New Jersey Supreme Court in *Morton* will finally establish the rule of law which is controlling in this case. This Court has the power to give the parties to this action the benefit of the New Jersey Supreme Court's decision, by accepting jurisdiction, granting this Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit and staying these proceedings pending the decision in the *Morton* case.

The insurers in the present case have been hard pressed to find even one New Jersey Supreme Court or Appellate Division case on point contrary to the clear decisions of *Broadwell Realty*, *Jackson Township*, *CPS Chemical* and *Lansco*. New Jersey's appellate courts have established a substantial body of precedent on questions relating to insurance coverage in the context of environmental claims. In fact, no state has more decisions on point in this area of the law than New Jersey. For the insurance companies in this case to ultimately prevail on the merits, they must persuade this Court, as they did the United States Court of Appeals for the Fourth Circuit, to ignore not just one, two or a few significant decisions of the lower courts in New Jersey (all of which are based on clear precedent as announced by the New Jersey Supreme Court in earlier cases of a similar nature), but must persuade this Court that New Jersey's Supreme Court will ignore the substantial body of existing New Jersey law and rule directly to the contrary when it renders its decision in *Morton*. It is unlikely that the New Jersey Supreme Court will ignore the decisions of *Broadwell Realty*, *Jackson Township*, *CPS Chemical*, *Lansco* and others when it decides this issue.

Respondent, Liberty Mutual, which specifically requested that this issue be resolved by the New Jersey Supreme Court in its cross-petition for certification in *Morton*, will suffer no prejudice or detriment of any kind

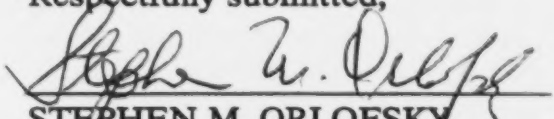
whatsoever if this Petition for a Writ of *Certiorari* is granted and these proceedings stayed pending the decision of the New Jersey Supreme Court in *Morton*. Indeed, the fact that Liberty Mutual cross-petitioned in *Morton* to have this issue finally resolved by the New Jersey Supreme Court reflects its desire to have this troublesome question settled.

CONCLUSION

For the reasons specified above, a Writ of *Certiorari* should be issued to the United States Court of Appeals for the Fourth Circuit in this matter, and the proceedings of this Court stayed, pending the decision of the New Jersey Supreme Court in *Morton*.

In the alternative, the Writ should be issued and the decision of the Fourth Circuit reversed because it erroneously predicted how the New Jersey Supreme Court would decide this issue of New Jersey law under the standards announced by this Court in *Salve Regina*.

Respectfully submitted,



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Dated: 5/29/92

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee,

v.

TRIANGLE INDUSTRIES, INCORPORATED, a/k/a ANC Holdings, Incorporated; TRIANGLE PWC, INCORPORATED,
Defendent & Third Party Plaintiffs-Appellants,

v.

NEW JERSEY PROPERTY-LIABILITY GUARANTY ASSOCIATION, on behalf of Ideal Mutual Insurance Company, in liquidation; ZURICH-AMERICAN INSURANCE COMPANIES; ZURICH INSURANCE COMPANY,
Third Party Defendants-Appellees,

and

WAUSAU INSURANCE COMPANIES; EMPLOYERS INSURANCE OF WAUSAU,
Third Party Defendants.

WESTINGHOUSE ELECTRIC CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION; OLIN CORPORATION; AMERICAN FIBER MANUFACTURERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION,
Amici Curiae.

No. 91-1685

Appeal from the United States District Court
for the Northern District of West Virginia, at Wheeling.
William M. Kidd, Senior District Judge.
(CA-88-41-W-K)

Argued: December 3, 1991

Decided: March 2, 1992

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and SHEDD, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Ervin and Judge Shedd joined.

COUNSEL

ARGUED: Stephen M. Orlofsky, BLANK, ROME, COMISKY & MCCAULEY, Cherry Hill, New Jersey, for Appellants. Lee Hadas Glickenhaus, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C., Boston, Massachusetts, for Appellees. **ON BRIEF:** Carlo Scaramella, BLANK, ROME, COMISKY & MCCAULEY, Cherry Hill, New Jersey, for Appellants. William F. Greaney, COVINGTON & BURLING, Washington, D.C. for Amici Curiae American Petroleum Institute and Chemical Manufacturers Association; H. Woodruff Turner, Peter J. Kalis, David M. Aceto, Thomas M. Reiter, William J. Pohlman, KIRKPATRICK & LOCKHART, Pittsburgh, Pennsylvania, for Amici Curiae Westinghouse Electric Corporation, American Fiber Manufacturers Association, International Business Machines Corporation, and Olin Corporation.

OPINION

NIEMEYER, Circuit Judge:

The question of whether insurance provides coverage for pollution damage is currently an important one that has far-reaching financial implications.[1] The answer determines who in the first instance bears the cost of pollution cleanup, although we recognize that it does not ultimately relieve the entire economy of the financial burden. In this case we conclude that certain insurance policies, interpreted in accordance with the law of New Jersey, do not provide coverage for the unintended environmental damage which allegedly continues to arise from the past regular surface disposal in a landfill of the waste products of a standard manufacturing process. We therefore affirm the judgment of the district court.

I

Triangle Industries, Inc., and its subsidiary, Triangle PWC, Inc., (collectively referred to as "Triangle") were involved in the fabrication of wire and cable at a processing plant in Glen Dale, West Virginia. As part of the fabrication process, Triangle utilized a method of "pickling" the steel used to make its wires and cables which produced a waste product known as "lime-stabilized waste pickle liquor sludge." Between November 1977 and October 1980, this lime-stabilized waste pickle liquor sludge was trucked by an independent contractor from the Triangle plant in West Virginia to a landfill near St. Clairsville, Ohio, where it was poured onto the ground.[2] Shortly after Triangle ceased dispos-

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1. In this regard, we received amicus curiae briefs from Insurance Environmental Litigation Association on behalf of 19 insurance companies and from Westinghouse Electric Corporation, International Business Machines Corporation, Olin Corporation, American Fiber Manufacturers Association, American Petroleum Institute, and Chemical Manufacturers Association.

2. We can suppose that in that lime-stabilized waste pickle liquor sludge "the slithy toves [d]id gyre and gimble." *See* Lewis Carroll, "Jabberwocky," from *Through the Looking Glass,* Ch. 1 (1872).

ing of the sludge at the site, the Ohio Environmental Protection Agency conducted tests and discovered that hazardous materials were leaking from the landfill.

After conducting some of its own tests, on December 7, 1984, the United States Environmental Protection Agency notified Triangle, as well as other companies, that it considered them "potentially responsible parties" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* (1988). On October 3, 1985, Triangle and the other potentially responsible parties entered into an administrative consent agreement with the federal agency, in which the companies agreed to begin cleaning up the site.

From January 1, 1981, to April 4, 1987, Triangle maintained a number of insurance policies with three different insurers. All of the policies include covenants to defend and indemnify Triangle against covered property damage, but each policy also expressly excludes coverage for certain categories of pollution damage.

While the particular language of spcific policies will be discussed later in some detail, it is useful to note at this point that this case involves, generally, three categories of insurance coverage. First, there are comprehensive general liability policies which contain what will be termed the "original" pollution exclusion clause. One of these policies, issued by Ideal Mutual Insurance Company, covered the years 1981 and 1982. The other, issued by Liberty Mutual Insurance Company, covered the period from January 1, 1982, to July 1, 1982. Second, there are comprehensive general liability policies with a "modified" pollution exclusion clause. Liberty Mutual issued policies of this type to Triangle, covering the period from July 1, 1982, to January 1, 1984. Afterwards, Zurich Insurance Company issued such policies covering the period from January 1, 1984, to April 1, 1987. Third, Zurich issued to Triangle a "claims-made" pollution liability insurance policy with a clause excluding

certain sites, which covered the period from May 15, 1984, to May 15, 1985.

On March 7, 1985, Triangle notified all of its insurers that it had been named a potentially responsible party and asked that they bear Triangle's investigatory and legal expenses, furnish Triangle a defense in its attempt to avoid or minimize, through litigation, the requirement of paying for the extensive enviornmental cleanup, and indemnify Triangle for actual cleanup costs. Of course, Triangle conceded "a reservation of rights by the carriers as to their ultimate responsibilities for indemnification." Because Ideal Mutual was in receivership, the receiver, New Jersey Property-Liability Guaranty Association, responded to Triangle, denying coverage under the policy with Ideal Mutual. Zurich responded on April 1, 1985, explaining that it questioned whether the pollution damage in Ohio was covered by its policies, but would handle "this matter under a full and complete reservation of rights." However, on August 28, 1985, Zurich withdrew its participation in Triangle's defense, effective October 1, 1985. Liberty Mutual responded on February 27, 1986, after Triangle sent them a second letter, agreeing to participate in Triangle's defense despite reservations regarding indemnity. Liberty Mutual continued to assist in Triangle's defense until February 1, 1988, when Liberty Mutual concluded that Triangle was not covered by any of its policies and so too withdrew its defense.

Shortly thereafter, Liberty Mutual brought this diversity action, asking for a declaratory judgment that it owes no duty to defend Triangle. Triangle asserted counterclaims and third-party claims against the other insurers, seeking a declaration that a defense is owed.

The district court certified legal questions to the West Virginia Supreme Court of Appeals, which replied that, under West Virginia's choice-of-law rules, New Jersey law governs the interpretation of all of the insurance contracts. Subsequently, on cross motions for

summary judgment, the district court held that although the environmental damage allegedly caused by dumping Triangle's sludge into the Ohio landfill was neither intended nor expected by Triangle, none of the insurance policies covered such damages by reason of pollution exclusions. This appeal followed.

II

Before beginning our analysis of the various insurance policies which are at issue in this appeal, we note that a federal court sitting in diversity has a duty to apply the operative state law as would the highest court of the state in which the suit was brought. Having certified the question to the highest court of West Virginia and thereby determined that the law of New Jersey governs the construction of each of Triangle's insurance contracts, it was the duty of the district court, as it is ours, to interpret these instruments as would the New Jersey Supreme Court. *See Brendle v. General Tire & Rubber Co.,* 505 F.2d 243, 245 (4th Cir. 1974).

The best evidence to this effect would be, of course, a decision by the highest court of New Jersey which addresses the contract interpretation issues now before us, but that court has not spoken to many of these questions. In such circumstances, the state's intermediate appellate court decisions "constitute the next best indicia of what state law is," although such decisions "may be disregarded if the federal court is convinced by other persuasive data that the highest court of the state would decide otherwise." 19 Charles A. Wright, Arthur R. Miller & Edward H. Cooper *Federal Practice & Procedure* § 4507, at 94-95 (1982). *See also West v. American Tel. & Tel. Co.,* 311 U.S. 223, 237 (1940). In predicting a decision of the state's highest court we can further consider, among other things, canons of construction, restatements of the law and treatises that are regularly applied by the courts of the state and whose use for a particular purpose is approved by the state's highest court, *see Fried v. North River Ins. Co.,* 710 F.2d

1022, 1025 (4th Cir. 1983), *and General Elec. Co. v. Sargent & Lundy,* 916 F.2d 1119, 1125 (6th Cir. 1990), recent pronouncements of general rules or policies by the state's highest court, *see Woodruff v. Tomlin,* 616 F.2d 924, 930 (6th Cir.), *cert. denied,* 449 U.S. 888 (1980), or even that court's well considered dicta, *see* 19 Wright, Miller & Cooper, *supra*, at 97. Decisions of the state's trial courts may also be considered to provide some light upon the subject. *See id.* at 96.

Finally, we note that the determination of state law by the district court is to be reviewed by us de novo. *See Salve Regina College v. Russell,* 111 S.Ct. 1217, 1221 (1991).

III

We begin our analysis of the insurance contracts at issue in this case with the comprehensive liability policies which include what we term the "original" pollution exclusion. Under these policies, which were issued to Triangle in 1981 and 1982 by Ideal Mutual and Liberty Mutual, insurance coverage is predicated upon the happening of an "occurrence," defined as an accident, including continuous or repeated exposure to conditions, which results in . . . *property damage neither expected nor intended* from the standpoint of the insured.

(Emphasis added.) The district court found, and neither party disputes, that the environmental *damage* allegedly caused by the disposal of Triangle's waste materials was unexpected. Thus the case is placed within the basic coverage of the comprehensive liability policies.

However, these comprehensive liability policies include a standard exclusion for damage caused by certain forms of pollution. This "original" pollution exclusion removes from coverage

> property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon

> land, the atmosphere or any water course or body of water; *but* this exclusion *does not apply* if such *discharge,* dispersal, release or escape *is sudden and accidental.*

(Emphasis added.) Once again, for purposes of this appeal there is no dispute that the environmental damage in this case arose from the discharge of pollutants upon the land, bringing this case within the initial precepts of the exclusion. The critical issue before us thus is whether the exception to the exclusion also applies, i.e., was "such discharge . . . sudden and accidental"?

Triangle argues that the New Jersey lower court opinions require us to read the "sudden and accidental" language in the exclusion as applying to the pollution *damage* rather than to the *discharge, dispersal, release or escape* of the contaminant. While there are appellate court decisions in New Jersey that support such a view, *see, e.g., Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.,* 528 A.2d 76, 85 (N.J. Super. Ct. App. Div. 1987), we are firmly persuaded that the highest court of New Jersey would not concur with these opinions. First, the plain language of the policy makes clear that the "exclusion does not apply if *such discharge, dispersal, release or escape* [as distinct from the *damage* caused] is sudden and accidental." While New Jersey law reads ambiguities in favor of the insured, it does not "write for the insured a better policy of insurance than the one purchased." *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.,* 562 A.2d 208, 214 (N.J. 1989). Furthermore, given that the *basic* coverage of these policies is afforded for an occurrence defined as a condition giving rise to unintended damages, a reading of the subsequent language which excludes from the basis coverage all releases of pollution *except* those which cause unintended *damages* simply restates the basic coverage and writes the pollution exclusion *completely* out of the contract. *See Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.,* 451 A.2d 990, 994 (N.J. Super. Ct. Law Div.

1982) ("[T]he clause can be interpreted as simply a restatement of the definition of 'occurrence' "). This construction violates a fundamental and long-standing principle that, where possible, meaning will be given to all of the clauses of an insurance policy. *See Smith v. Fidelity & Deposit Co.,* 120 A. 322, 323 (N.J. 1923). As New Jersey's highest court stated in *Prather v. American Motorists Ins. Co.,* 67 A.2d 135, 138 (N.J. 1949), "Effect, if possible, will be given to all parts of the instrument, and the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable."

Finally, at least one opinion on which the *Broadwell* court appears to have relied in making its conclusion that the "sudden and accidental" language refers to the *damages* rather than the *discharge* of pollutants, *see Broadwell,* 528 A.2d at 83, in fact focused on whether the *discharge* of the pollutant was intended, rather than on the injury resulting from the discharge. *See Lansco, Inc. v. Dep't. of Envtl. Protection,* 350 A.2d 520, 524 (N.J. Ch. 1975) ("[S]ince the *spill* was neither expected nor intended . . . it follows that the oil *spill was sudden and accidental* under the exclusion clause . . . ."), *aff'd* 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976) (per curiam). Thus we believe that the Supreme Court of New Jersey would conclude from the language of these policies that (1) basic coverage arises from the occurrence of unintended damages; but (2) such damages as arise from the discharge of various pollutants are excluded from this basic coverage; except that (3) damages arising from the discharge of these pollutants will fall within the coverage of these policies where such *discharge is sudden and accidental.*

To apply this construction to the facts of this case, we ask initially whether the discharge of the toxic sludge upon the ground at the landfill in St. Clairsville, Ohio, was an act expected or intended by Triangle. If so, the discharge could not be "accidental," and the resulting

damage, even though unintended, would be excluded from coverage under the language of the pollution exclusion.

While Triangle points to a substantial quantity of evidence which tends to support the fact that Triangle did not know of the *harm* that would be caused by dumping its waste products at the Ohio landfill, no evidence was presented to the court below to demonstrate that Triangle did not expect and intend its sludge to be dumped upon the ground at the landfill. The sludge was a normal by-product of Triangle's manufacturing operation. The company hired trucks to haul the waste to the Ohio landfill. And Triangle corresponded with persons at the landfill, discussing the liquidity of the semi-solid sludge being dumped at the fill. Given this, we agree with the district court that the open dumping of a sludge onto the ground, particularly when performed as part of a regular business activity, cannot be considered an accidental discharge of the contaminant. Under the law of New Jersey, we therefore conclude that the losses sustained by reason of such an operation are not covered by the Liberty Mutual and Ideal Mutual comprehensive general liability policies containing the original pollution exclusion (with the "sudden and accidental" language).

IV

We next address the comprehensive general liability policies, issued by Liberty Mutual and Zurich, which contain what we term the "modified" pollution exclusion language. As was the case with the policies containing the "original" pollution exclusion, basic coverage under the policies with the "modified" pollution exclusion is not questioned. As before, the issue on appeal is whether the pollution exclusion language removes the damages arising in this case from the coverage of these policies.

The modified language excludes coverage for

> property damage arising out of the discharge,

> dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but* this exclusion *does not apply to* bodily injury or property *damage included within the product hazard or the completed operations hazard* if the discharge, dispersal, release, or escape originates away from premises owned by, rented or loaned to a named insured.

(Emphases added.) These terms make clear that *all* releases of pollutants are excluded from the coverage of these policies unless such releases are included within the "product hazard" or the "completed operations hazard" which is covered by the policy.

The term "product hazard" is a standard one in the insurance industry. Liability insurance policies are often issued "to protect the producer or manufacturer of goods against loss or injury to the person or property of others caused by the use of his products." 11 *Couch on Insurance, 2d* § 44:387 (2d ed. 1982). The "product hazard" language reflects an attempt to describe that protection. *See CPS Chem. Co. v. Continental Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds*, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985). Likewise, the term "completed operations hazard" refers to an analogous form of protection offered for the benefit of those policyholders who provide a service in addition to or instead of a particular product. *See id.* ("Commentators are in complete agreement that this exclusion refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or service contracts.") (citing 58 A.L.R.3d § 2(a)).

The district court had little trouble concluding that the property damage in this case, which allegedly resulted from the disposal of a manufacturing *waste*

product, involved neither a service operation nor a product of Triangle. We agree. The court noted in *CPS Chem. Co.* that "[the disposal of manufacturing wastes] does not involve construction or service operations" and "[i]ndustrial wastes not intended for consumption, sale, or use by others are not 'products.' " 489 A.2d at 1270. We find this reasoning to be sound and so conclude that the pollution damages which arose in this case also are not covered by the language of these policies containing the modified pollution exclusion.

V

Zurich also issued to Triangle, in May 1984, a third type of insurance policy, a "claims-made" pollution liability insurance policy which contained a clause excluding the pollution arising from certain physical sites. These policies obligate Zurich to indemnify Triangle for property damage claims made during the policy period which result from the

> emision, discharge, release, or escape of any solid, liquid, gaseous, or thermal contaminants, irritants, or pollutants directly from *the insured site* into or upon the land.

The policy goes further to define the term "insured site" as

> 1) the specific location or part thereof specified as such in the declarations of this policy, or 2) any site to which waste materials were legally consigned or delivered by a named insured for storage, disposal, processing, or treatment, provided that the site . . . was *duly authorized* for such storage, disposal, processing, or treatment *under a permit issued by sate or federal authority* and in force at the time of all such consignment or delivery.

(Emphasis changed.) No contention is made in this case that the ~~Ohio~~ landfill was specifically identified as an insured site in the Zurich policies. Thus, the alleged damages resulting from the release of pollutants from

the landfill can only be covered by the policy if "the site . . . was duly authorized for such storage, disposal, processing, or treatment under a permit issued by state or federal authority."

Triangle does not seriously argue that is presented to the district court any evidence upon which a reasonable fact finder could conclude that the Ohio landfill was authorized to store its sludge by the state of Ohio or the federal government. Indeed the record reflects that in 1979 the Ohio Environmental Protection Agency expressly denied requests to allow the dumping of any sludge at the landfill, such requests having been made by the county in which the landfill was located. The state agency concluded:

> No liquids, semi-solids (sludges) or hazardous waste can be approved for landfilling or disposal . . . . The site is considered very permeable and would not secure fluids contained in the waste.

In an effort to avoid the inevitable conclusion that the state of Ohio did not approve the landfill for storage of Triangle's sludge, Triangle now argues that the state was preempted by federal environmental regulations from regulating the disposal of nontoxic wastes at the state's landfills. That the Supreme Court has declared that a state "has every right to [protect its residents' pocketbooks as well as their environment] by slowing the flow of *all* waste into the State's remaining landfills" so long as it does not specifically discriminate against articles of commerce from outside the state, readily disposes of this argument as well. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978). Because the landfill was not approved for storage or disposal of Triangle's waste, we conclude that the district court was also correct in denying coverage under the Zurich claims-made policy.

VI

Finally, we address the argument by Triangle that Liberty Mutual and Zurich should be estopped from denying their duty to defend Triangle in this toxic waste litigation. Triangle relies primarily upon the holdings of *Battista v. Western World Ins. Co., Ins.*, 545 A.2d 841 (N.J. Super. Law Div. 1988), *aff'd in part and rev'd in part on other grounds sub. nom., Battista v. Olson*, 594 A.2d 260 (N.J. Super. Ct. App. Div. 1991), and *Merchants Indem. Corp. v. Eggleston*, 179 A.2d 505 (N.J. 1962). However, neither of these cases substantially supports Triangle's contention.

In *Battista* the court concluded that a defense by an insurance company with a reservation of right to disclaim coverage for *general* damages precluded the insurance company from disclaiming coverage for *punitive* damages *after a loss at trial. Battista,* 545 A.2d at 845-46. Likewise, in *Eggleston*, the New Jersey Supreme Court stated that an insurer can be estopped from raising its defense to indemnification by conducting the insured's legal defense. *Eggleston,* 179 A.2d at 512-13 (dictum).

Unlike the cases upon which Triangle attempts to rely, neither Zurich nor Liberty Mutual defended Triangle until its liability was conclusively established at trial. On the contrary, both insurance companies agreed initially to defend Triangle (with a *complete* reservation or rights under the policies) because the policies, as interpreted by New Jersey law, require them to do so. *See Mt. Hope Inn v. The Travelers Indem. Co.,* 384 A.2d 1159, 1162, 1164 (N.J. Super. Ct. Law Div. 1978). After further review of the situation and their policies (and well before any trial on the issue or Triangle's liability) the insurance companies concluded that they had no duty to indemnify Triangle for the damage resulting from the sludge dumped at the Ohio landfill. Because "the duty to defend extends only to claims on which there would be a duty to indemnify in the event of a judgment adverse to the insured," *see Hartford Accident*

& Indem. Co. v. Aetna Life & Casualty Ins. Co., 483 A.2d 402, 405 (N.J. 1984) (per curiam), Zurich and Liberty Mutual withdrew their defense of Triangle. *See also Burd v. Sussex Mutual Ins. Co.*, 267 A.2d 7, 10 (N.J. 1970) (noting that a covenant to defend does not oblige a carrier to "defend claims which would be beyond the covenant to pay if the claimant prevailed").

There may exist a point before the actual rendering of a verdict against the insured at which the New Jersey courts will consider that, despite a prior reservation as to coverage, the withdrawal from the defense of the insured (because of a determination that coverage does not exist or for other reasons) causes such harm to the insured that the insurer will be estopped from doing so. We are not convinced, however, that such a point arises in this case. The district court noted that "there is no evidence that the actions of Liberty or Zurich prejudiced Triangle by leaving it defenseless or seriously hampered its ability to protect itself so as to warrant estoppel." And Triangle admitted as much at oral argument when it conceded that the only prejudice to Triangle resulting from Liberty Mutual and Zurich's withdrawal from its defense was the loss of their assistance in the on-going litigation. That being the case, there are no grounds for estoppel, *see Eggleston,* 179 A.2d at 512 ("undoubtedly prejudice is an essential ingredient") (dictum), and in light of our decision with regard to the coverage of the insurance policies in question, Liberty Mutual and Zurich had every right to withdraw their legal assistance.

VII

In summary, because the discharge of sludge upon the ground at the Ohio landfill was intended as the standard course of Triangle's business and was not "accidental," policies containing the "original" pollution exclusion for "sudden and accidental" releases of pollutants do not provide coverage, even though the damage caused by the discharge was unintended. Also, because

the damage arising from wastes produced in a manufacturing process are included in neither a "product hazard" nor a "completed operations hazard" under New Jersey law, policies containing the "modified" pollution exclusion do not provide coverage. Finally, because Triangle produced no evidence that the landfill in which its sludge was placed was approved for the storage of such sludge by the state of Ohio or the federal government, the "claims made" policy does not provide coverage for damage caused by the sludge. Triangle's alternative argument that there is coverage-by-estoppel is also rejected in the circumstances of this case, and accordingly the decision of the district court is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
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NORTHERN DISTRICT OF WEST VIRGINIA

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff,

Vs.

TRIANGLE INDUSTRIES, INC. (now Trian Holdings, Inc.) and TRIANGLE PWC, INC.,
Defendants and Third-Party Plaintiffs,

Vs.

WAUSAU INSURANCE COMPANIES and EMPLOYERS INSURANCE OF WAUSAU, NEW JERSEY PROPERTY-LIABILITY GUARANTY ASSOCIATION, on behalf of IDEAL MUTUAL INSURANCE COMPANY, in liquidation, and ZURICH-AMERICAN INSURANCE COMPANY, severally and in the alternative,
Third-Party Defendants.

CIVIL ACTION NO. 88-0041-W(K)

MEMORANDUM OPINION AND ORDER

Currently pending are the parties, cross-motions for summary judgment in this declaratory action, invoking the Court's diversity jurisdiction. Said motions, having been fully briefed, are ripe for disposition.

The defendants, Trian Holdings, Inc. (formerly Triangle Industries, Inc.), and Triangle PWC, Inc. ("Triangle"), seek a declaration that the plaintiff, Liberty Mutual Insurance Company ("Liberty"), and third-party

defendants, Wausau Insurance Companies and Employers Insurance of Wausau ("Wausau")[1], New Jersey Property-Liability Guaranty Association, on behalf of Ideal Mutual Insurance Company, in liquidation ("NJPLIGA"), and Zurich-American Insurance Company ("Zurich"), owe a duty to defend and indemnify Triangle for governmental demands for clean-up of a hazardous waste facility. All of the insurers deny coverage under their respective insurance policies with Triangle.

The facts underlying this action are basically undisputed. Triangle, a New Jersey Corporation, owned and operated a steel "pickling, plant in Glen Dale, West Virginia. Triangle's operations at this plant generated a waste product known as "lime stabilized waste pickle liquor sludge" ("sludge").

Between November 1977 and October 1980, the sludge was shipped for disposal to the Buckeye Reclamation Landfill, located in St. Clairsville, Ohio. Triangle engaged the services of an independent contractor to transport the sludge to the landfill site.

On October 15, 1980, the Ohio EPA conducted sampling of the sludge located at the Buckeye Landfill, and determined that the sludge was "toxic" according to its criteria. In December 1980, the Ohio EPA conducted further sampling of surface water from a stream near the Buckeye Landfill. Analysis of these water samples indicated that contaminated materials were escaping from the landfill.

On September 8, 1983, the Buckeye Landfill was listed on the National Priority's List pursuant to

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1. By letter dated January 28, 1991, counsel for Wausau has informed the Court that it is currently negotiating a settlement with Triangle and requested that the Court defer ruling on Triangle's summary judgment motion as it pertains to Wausau. The Clerk is directed to file said letter. Accordingly, ruling herein is deferred for a period of thirty (30) days from entry of this Opinion, at which time Triangle and Wausau will submit an Order dismissing their claims as settled or Wausau will file its brief in opposition.

§ 105(8)(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). Based upon tests conducted at the site, the Ohio EPA and the United States EPA ("USEPA") concluded that the Buckeye Landfill had been releasing and was continuing to release hazardous substances which posed an imminent and substantial danger to the public health, welfare, and the environment.

On December 7, 1984, Triangle was notified by the USEPA that it was being designated a "potentially responsible party" pursuant to CERCLA, in connection with the environmental contamination at the Buckeye Landfill. On October 3, 1985, Triangle, along with other potentially responsible parties, executed an administrative order, known as a consent decree, as required by Ohio EPA and USEPA, for the cleanup of the Buckeye Landfill.

NJPLIGA issued a one year comprehensive general liability insurance ("CGL") policy to Triangle, effective January 1, 1981 to January 1, 1982. Liberty issued two CGL policies covering the periods January 1, 1982 to January 1, 1983, and January 1, 1983 to January 1, 1984, as well as a "claims-made" policy that covered the period July 1, 1982 to May 15, 1984 .[2] Zurich issued four CGL policies to Triangle, from January 1, 1984 to January 1, 1985, from January 1, 1985 to January 1, 1986, from January 1, 1986 to January 1, 1987, and from January 1, 1987 to April 1, 1987. Zurich also issued two claims-made Pollution Liability Insurance ("PLI") policies to Triangle which were in effect from May 15, 1984 to November 8, 1985.

By letter dated March 7, 1985, Triangle's counsel notified all of its insurance carriers of the claims asserted by the USEPA rising out of the enforcement actions at

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2. Because Triangle's claims were not made within the applicable dates on Liberty's "claims-made" policy, there are no bona fide disputes concerning coverage under this policy.

the Buckeye Landfill, requested that the carriers provide a defense, and agreed that any defense would be under a reservation of rights by the carriers. By letter (lated November 19, 1986, NJPLIGA denied coverage. By letters dated October 30, 1985, January 23, 1986, February 27, 1986, May 21, 1986, July 8, 1986, August 19, 1986, August 27, 1986, and December 9, 1986, Liberty initially agreed to participate in the defense of Triangle by paying a portion of the fees of Triangle's retained counsel, believing it, as well as the other carriers, had a duty to defend Triangle pending further investigation. However, by letters dated June 1, 1987 and February 1, 1988, Liberty determined that the policies provided no coverage and, therefore, ceased its defense of Triangle. By letter dated April 1, 1985, Zurich also initially agreed to participate in the defense of Triangle under a reservation of rights. By letter dated August 28, 1985, Zurich informed Triangle that it denied coverage and would no longer participate in the defense of Triangle.

All of the insurance policies involved in this action were entered into by the parties in New Jersey. In answering a certified question by the Court, the West Virginia Supreme Court of Appeals held that New Jersey law controls the interpretation of the insurance policies in questions. *Liberty Mut. Ins. Co. v Triangle Industries, Inc.,* 390 S.E.2d 562 (W.Va. 1990). The Court will now proceed to rule on the questions of law involved herein.

Since the CGL policies contain identical language, the Court will proceed with questions of law common to all insurers. The first question is whether an "occurrence" has transpired which would precipitate coverage under the general conditions of the policies. An occurrence, is defined as:

> an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"Property damage" is defined as:

> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

The first issue to determine, therefore, is whether "property damage" occurred during the policy period. New Jersey has adopted the "continuous trigger" theory which "holds that where an injury process is not a definite, discrete event, the date of the occurrence should be the continuous period from exposure to the manifestation of damages." *Gottlieb v. Newark Ins. Co.*, 238 N.J. Super 531, 535, 570 A.2d 443 (App.Div. 1990); *Lac D'Amiante du Ouebec Ltee. v. American Home Assur. Co.*, 613 F.Supp. 1549 (D.N.J. 1985). The insurers argue that the manifestation of harm occurred when Ohio EPA detected the contamination at the Buckeye Landfill before January 1, 1981. On the other hand, Triangle argues that since the site has not yet been cleaned up, property damage is still occurring.

The Court believes that under New Jersey law the manifestation of harm occurs when the insured is damaged. *Hartford Acci. & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 27, 483 A.2d 402 (1984). As such, the Court finds that the manifestation of harm occurred on December 7, 1984, when Triangle was notified by the USEPA that it was being designated a "potentially responsible party" pursuant to CERCLA. Accordingly, the Court holds that the property damage at the Buckeye Landfill occurred from 1978 until December 7, 1984. Therefore, property damage occurred during all of the CGL policies, periods.

Since property damage occurred during the respective policy periods, the Court now must determine whether the property damage resulted from an accident which was "neither expected nor intended from the standpoint of the insured." In regard to the definition of "occurrence," the focus is on whether the *property damage* was unexpected and unintended by Triangle. The Court has no doubt that Triangle neither expected nor intended that the sludge deposited at the Buckeye Landfill would give rise to a claim by Ohio EPA and USEPA that Triangle would be responsible for clean-up costs at the Buckeye Landfill. Therefore, the Court finds that an "occurrence" has transpired giving rise to coverage under the CGL policies.

The next question of law, is whether the pollution exclusion clause found in the CGL policies of Liberty and NJPLIGA exclude coverage herein. The pollution exclusion clause provided that the policies do not apply:

> To bodily injury property damage arising out of pollution or contamination due to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Triangle argues that the pollution exclusion clause does not apply so long as the "discharge, dispersal, release or escape" was unexpected and unintended. Lower court decisions in New Jersey do support Triangle's argument that "sudden and accidental" means "unexpected and unintended." *Lansco, Inc. v. Department of Environmental Protection,* 138 N.J.Super. 275, 350 A.2d 520 (Ch.Div. 1975), *aff'd,* 145 N.J.Super. 433, 368 A.2d 363 (App.Div. 1976), *certif. den.,* 73 N.J. 57, 372 A.2d 322(1977). However, the New Jersey Supreme Court has never addressed this issue. The Court need not

decide this issue because the Court finds that Triangle expected and intended that the sludge be deposited at the Buckeye Landfill.

Triangle's argument that it did not expect nor intend the property damage at the Buckeye Landfill does not relieve it from the pollution exclusion clause of the CGL policies. Unlike the definition of "occurrence," which focuses on the property damage, the pollution exclusion clause language focuses on the discharge, dispersal, release or escape of the pollutants. *See Claussen v. Aetna Cas. & Sur. Co.,* 259 Ga. 333, 380 S.E.2d 686 (1989)("The pollution exclusion clause focuses on whether the *'discharge, dispersal or release'* of the pollutants is unexpected and unintended; the definition of occurrence focuses on whether the *property damage* is unexpected and unintended. The pollution exclusion clause therefore has the effect of eliminating coverage for damage resulting from the intentional discharge of pollutants."). To hold otherwise would eviscerate the pollution exclusion clause.

Therefore, since Triangle intentionally had the sludge disposed of at the Buckeye Landfill, the pollution exclusion clause excluded coverage under the CGL policy. There is no coverage under the CGL policies issued by Liberty and NJPLIGA.

Another pollution exclusion clause found in the CGL policies issued by Zurich and in Endorsement 10 of the Liberty policy provides that no coverage exists for pollution damage unless the pollution damage arises out of "products hazard" or the "completed operations hazard." Triangle's claim does not arise out of the "products hazard," since the sludge was clearly a waste product, nor out of the "completed operations hazard" since the sludge was hauled away and dumped off the premises of Triangle by an independent contractor. Therefore, there is no coverage of Triangle under the CGL issued by Zurich nor under Endorsement 10 of the CGL issued by Liberty.

The remaining insurance policy upon which Triangle seeks coverage is Zurich's PLI policy. Zurich argues that there is no coverage because the Buckeye Landfill was not an insured site. "Insured site" is defined as:

> any site to which waste materials were legally consigned or delivered by a ***named insured*** for storage, disposal, processing, or treatment, provided that the site
>
> > (a) is not and was never owned by, operated by, rented or loaned to a ***named insured;*** and
> >
> > (b) was duly authorized for such storage, disposal, processing, or treatment under a permit issued by state or federal authority and in force at the time of all such consignment or deliver.

Zurich asserts that the Buckeye Landfill was not an insured site because it was not licensed to accept the sludge from Triangle. The facts clearly show that the Buckeye Landfill was not licensed by Ohio EPA to receive the sludge from Triangle. Triangle, however, argues that any Ohio regulation prohibiting the disposal of the sludge is preempted by federal law. Triangle's argument is without merit. There is no preemption of Ohio's right to regulate its landfills. Therefore, since the Buckeye Landfill was not authorized to accept the disposal of the sludge from Triangle, the Buckeye Landfill was not an insured site. Accordingly, there exists no coverage under the PLI issued by Zurich.

The final issue to determine is whether Liberty and Zurich are estopped from denying coverage due to the actions they took after being notified by Triangle of the claim made by USEPA. In its notice of claim, Triangle specifically informed the insurers that it would honor a reservation of rights by the carriers. Both Liberty and Zurich agreed to partially reimburse Triangle's retained counsel until a determination of coverage was made. Subsequently, both carriers determined that no coverage existed and, therefore, there was no duty to defend.

Furthermore, there is no evidence that the actions of Liberty or Zurich prejudiced Triangle by leaving it defenseless or seriously hampered in its ability to protect itself so as to warrant estoppel. As such, neither Liberty nor Zurich are estopped from denying coverage. *Griggs v. Bertram,* 88 N.J. 347, 443 A.2d 163 (1982).

It is therefore ORDERED that the respective motions for summary judgment by Liberty, NJPLIGA, and Zurich should be, and the same are hereby, GRANTED, and the respective cross-motions for summary judgment by Triangle are DENIED.

The Clerk is directed to transmit certified copies of this Memorandum Opinion and Order to counsel of record herein.

ENTER:

/s/ William M. Kidd
WILLIAM M. KIDD
UNITED STATES DISTRICT JUDGE

I hereby certify that the annexed instrument
is a true and correct copy of the original filed
in my office
ATTEST: Dr. Wally Edgell
Clerk, U.S. District Court
Northern District of West Virginia

By: /s/ Sheree N. Thompson
Deputy Clerk

UNITED STATES DISTRICT COURT
91 JUL-5 AM 9: 19
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

LIBERTY MUTUAL INSURANCE CO.,

Plaintiff/Counterdefendant,

v.

TRIANGLE INDUSTRIES, INC. (now TRIAN HOLDINGS, INC.) and TRIANGLE PWC, INC.,

Defendants/Counterplaintiffs/ Third-Party Plaintiffs,

v.

WAUSAU INSURANCE COMPANIES and EMPLOYERS INSURANCE OF WAUSAU, NEW JERSEY PROPERTY-LIABILITY INSURANCE GUARANTY ASSOCIATION, on behalf of IDEAL MUTUAL INSURANCE COMPANY, in liquidation, ZURICH-AMERICAN INSURANCE COMPANY and ZURICH INSURANCE COMPANY, jointly, severally and in the alternative,

Third-Party Defendants.

On remand from the Supreme Court of Appeals of West Virginia

Civil Action No. 88-0041-W(K)

FINAL ORDER DISMISSING THIRD-PARTY DEFENDANT, EMPLOYERS' INSURANCE OF WAUSAU, AND ENTERING FINAL JUDGMENT IN FAVOR OF PLAINTIFF, LIBERTY MUTUAL INSURANCE COMPANY, AND THIRD-PARTY DEFENDANTS, ZURICH INSURANCE COMPANY AND NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTY ASSOCIATION ON BEHALF OF IDEAL MUTUAL INSURANCE COMPANY

It being reported to the Court that the Defendants/Third-Party Plaintiffs, Triangle Industries, Inc. and Triangle PWC, Inc. ("Triangle") and Third-Party Defendant, Employers Insurance of Wausau ("Wausau") having reached an amicable resolution to the claims asserted by and against them, it is accordingly

ORDERED that the claims asserted by Triangle against Wausau and the claims asserted by Wausau against Triangle are hereby dismissed pursuant to *Fed. R. Civ. P.* 41 (a)(2) with prejudice and without costs; and

IT IS FURTHER ORDERED that the Court's March 12, 1991 Memorandum and Opinion Order granting summary judgment in favor of Plaintiff, Liberty Mutual Insurance Company, and Third-Party Defendants, Zurich Insurance Company and New Jersey Property Liability Insurance Guaranty Association on behalf of Ideal Mutual Insurance Company, shall and is hereby declared final pursuant to 28 U.S.C. § 1291.

DATED: 7/3/91 (Signed) William M. Kidd

Honorable William M. Kidd
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original filed in my office.
ATTEST: Dr. Wally Edgell
Clerk, U. S. District Court
Northern District of West Virginia
By: /s/ Sheree N. Thompson
Deputy Clerk

FILED
FEB 21 1990

NO. CC999

LIBERTY MUTUAL INSURANCE COMPANY

v.

TRIANGLE INDUSTRIES, INC., AND TRIANGLE PWC, INC.

v.

WAUSAU INSURANCE COMPANIES AND
EMPLOYERS INSURANCE OF WAUSAU; NEW JERSEY
PROPERTY-LIABILITY GUARANTY ASSOCIATION,
ON BEHALF OF IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION, AND ZURICH-AMERICAN INSURANCE COMPANY,
SEVERALLY AND IN THE ALTERNATIVE

Certified Question — Certified question answered; case remanded.

Brotherton, Justice

Syllabus

In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary, to the public policy of this state.

Brotherton, Justice:

This case involves two questions certified to this Court from the United States District Court for the Northern District of West Virginia. The district court asks that we answer the following:

1. Does West Virginia's substantive law apply to the interpretation of the insurance policies at issue?
2. If so, do the insurance policies at issue give rise to a duty to defend and indemnify the insured by the respective insurers?

I.

Triangle Industries (alternately known as Trian Holdings, Inc. and Triangle PWC, hereinafter referred to as Triangle) is a company that was headquartered in New Jersey at the time the insurance coverage at issue was sought. Triangle owned and operated a processing plant in Glen Dale, West Virginia. The Glen Dale plant was engaged in the business of steel "pickling" which generated a waste product known as "lime stabilized waste pickle liquor sludge" (sludge).

Between November, 1977, and October, 1980, the sludge was shipped for disposal to the Buckeye Landfill outside St. Clairsville, Ohio. Triangle engaged the services of an independent contractor to transport the sludge to the landfill.

On October 15, 1980, the Ohio EPA conducted sampling of the sludge located at the Buckeye Landfill site and determined that the sludge was "toxic." In December, 1980, the Ohio EPA conducted further samplings of surface water from a stream near the Buckeye Landfill. The water analysis indicated that contaminated materials were escaping from the landfill.

On September 8, 1983, the Buckeye Landfill was listed on the National Priorities List pursuant to § 105(8)(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601 et seq. (West 1983) (CERCLA). Based upon tests conducted at the site, the Ohio EPA and the Federal EPA concluded that the Buckeye Landfill had been releasing and was continuing to release hazardous substances which posed an imminent and substantial danger to the public health, welfare, and the environment.

On December 7, 1984, Triangle was notified by the Federal EPA that it was being designated a "potentially responsible party" pursuant to CERCLA, in connection with the environmental contamination at the landfill.

On March 7, 1985, Triangle's counsel placed all of Trian and PWC's insurance carriers on notice of the claims asserted by the Federal EPA arising out of the enforcement actions at the Buckeye Landfill. In response, the plaintiff, Liberty Mutual, acknowledged its duty to defend Triangle. In a February 27, 1986, letter from James M. Shaw, Examiner, Special Claims Division, Liberty Mutual Insurance Company, Mr. Shaw stated, "We do, however, agree to participate in the defense of Triangle with other insurers that owe a duty to defend."

On October 3, 1985, Triangle, along with other potentially responsible parties, executed an administrative order, known as a consent decree, as required by the Federal and Ohio EPA, for the cleanup of the landfill.[1]

By letter dated February 1, 1988, Donald Nelson, Technical Claims Specialist at Liberty Mutual Insurance Company, denied coverage under each of Liberty Mutual's insurance policies and declared that Liberty Mutual would not provide indemnification for this claim and would not pay for defense costs beyond February 1, 1988.[2]

By letter dated March 25, 1988, defense counsel wrote to Liberty Mutual to clarify Triangle's position regarding the insurance coverage. In this letter, counsel for Triangle stated that coverage should be afforded under the comprehensive general liability policy (CGL)

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1. The Buckeye Landfill, also known as the Belmont County Landfill, is located in Ohio on approximately 50 acres of a 650-acre tract of land owned by the Ohio Resources Corporation. The property is located approximately four miles southeast of St. Clairsville, Ohio. The landfill has been in operation since 1971.

2. In its brief, Liberty Mutual defends its actions in initially defending the claim by pointing out that it had a duty to investigate the claim to determine whether they did owe a duty to defend. Liberty Mutual denied coverage once they determined they no longer had a duty to defend.

because there had been an "occurrence," as defined by the policy, during the policy period.[3]

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3. The CGL policy contained standard policy language, which provided that:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A: Bodily injury or
> Coverage B: Property damage,
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment or judgment or settlement.

The policy also contains a pollution liability exclusion at subsection (f). It provides that this policy does not apply:

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Liberty Mutual supplied Triangle with a pollution liability policy (PLP), with an effective or "retroactive" date of July 1, 1982. The policy was renewed to run for an additional year from July 1, 1983, to July 1, 1984. The policy appears to have been cancelled in May, 1984. The PLP provides that

> The company [Liberty Mutual] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as compensatory damages because of bodily injury or property damage to which this insurance applies, provided that: (1) such bodily injury or property damage is caused by a pollution incident which commences subsequent to the retroactive date shown in the declaration of this policy, and (2) the claim for such damages is first made against the insured during the policy period and reported to the company during the policy period or within fifteen days after its termination.

Finally, Triangle advised Liberty Mutual that if it continued to decline coverage, Triangle would initiate a declaratory judgment action. However, three weeks later, Liberty Mutual filed suit in United States District Court for the Northern District of West Virginia requesting a declaratory judgment, stating that it owed no duty to defend or indemnify Triangle.

On June 20, 1988, the defendants filed a third party complaint against third party defendants, Wausau Insurance Companies, Zurich American Insurance Company, and New Jersey Property Liability Insurance Guarantee Association on behalf of Ideal Mutual Insurance Company, in liquidation (NJPLIGA), who also held CGL and other insurance policies for the defendants.[4]

On January 17, 1989, the plaintiff, Liberty Mutual, filed a motion for summary judgment against the defendants. on March 1, 1989, the defendants filed a cross motion for summary judgment. Similar motions were filed by the other third party defendants. By order dated July 5, 1989, the United States District Court for the Northern District of West Virginia certified the two questions listed above to this Court.

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4. The defendant contends that it is entitled to coverage under eleven separate policies of insurance, running collectively, from January 1, 1977, to April 1, 1987.

1/1/77 – 1/1/81	Wausau Insurance Co.
1/1/81 – 1/1/82	Ideal Mutual (in liquidation NJPLIGA)
1/1/82 – 1/1/84	Liberty Mutual
1/1/84 – 4/1/87	Zurich Insurance Co.

II.

The first certified question asks that we determine whether West Virginia substantive law applies to the interpretation of the insurance policies at issue in this case. We must first identify the type of issue involved in order to determine what conflict of law rule to apply.[5] This Court has held that the interpretation of insurance policy coverage, rather than liability, is treated as a contract question for purposes of conflicts analysis. *Lee v. Saliga*, ___W.Va. ___, 373 S.E.2d 345, 350 (1988). As the issue presented in the case before us involves a question of the interpretation of the terms of an insurance policy, we must therefore focus our analysis on the conflicts of law rule applicable to a contract issue.

West Virginia law has not yet dealt with the precise issue of the applicable choice of law when an insurance policy is executed in one state for coverage in another state, and damage takes place in a third. The general issue of choice of law was examined in *General Electric Co. v. Keyser*, 166 W.Va. 456, 275 S.E.2d 289 (1981), in which this Court invalidated a choice of law provision contained in a contract after examining § 187(2) of the *Restatement (2d) of Conflict of Laws (Restatement)*. At syllabus point 2, the Court concluded that:

> "The law of the state in which a contract is made and to be performed governs the construction of a contract when it is involved in litigation in the courts of this state." Syl. pt. 1 (in part) *Michigan National Bank v. Mattingly*, W.Va., 212 S.E.2d 754 (1975).

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5. In *Paul v. National Life*, ___W.Va. ___, 352 S.E.2d 550 (1986), this Court upheld the *lex loci delicti* theory of conflicts of law when a tort is involved. In *Paul*, the court found that "*[l]ex loci delicti* has long been the cornerstone of our conflict of laws doctrine. The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly . . . ." *Id.* at 555.

More recently, in *Lee v. Saliga*, ___W.Va. ___, 373 S.E.2d 345 (1988), this Court examined insurance contracts under a conflicts of law analysis. *Saliga* involved a question of coverage under an uninsured motorist policy issued in Pennsylvania, where the accident in question occurred in West Virginia. Under West Virginia law, a requirement of physical contact is directly incorporated into the uninsured motorist statute. By contrast, Pennsylvania did not require physical contact under its uninsured motorist act, as the physical contact requirement was held void as contrary to public policy.

After reviewing the West Virginia choice of law cases and the *Restatement*, Justice Miller determined that:

> our traditional contract conflict rule gives substantial deference to the state where the contract is made and where it is to be performed, assuming both incidents occur in the same state. This rule is subject to two qualifications: (1) that the parties have not made a choice of applicable law in the contract itself; and (2) the law of the other state does not offend our public policy.

Id. at 351. Applying that rule to the facts in *Saliga*, the Court determined that "[t]he provisions of a motor vehicle liability policy will ordinarily be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another state has a more significant relationship to the transaction and the parties." *Id.* at 353.

Both cases, however, fail to contemplate a situation in which the contract is made in one state to be performed in another state.[6] In the case now before us,

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6. This Court addressed a similar situation in *New v. Tac & C Energy, Inc.*, ___W.Va. ___, 355 S.E.2d 629 (1987), which involved an employment contract for a company based in West Virginia concerning its mine site in Kentucky. A review of § 196 of the *Restatement* revealed that when a contract to render services was involved, the *Restatement* gives preference to the law of the

we find that the policy was issued in New Jersey, while the insured risk was located in West Virginia and the damage occurred in Ohio. Further, as Triangle points out, the insurance policies insured risks in numerous other locations besides the Glen Dale, West Virginia, site. Obviously, these facts differ sufficiently from previous case law so as to require an independent analysis under the *Restatement*.

Section 193 of the *Restatement* concerns what law to apply when the "validity of a contract of fire, surety or casualty insurance and the rights created thereby" are questioned. Specifically, Section 193 provides that the validity of such a contract is determined:

> by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

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state where the services are to be performed, subject to the contracting parties' choice of law and the theory that the preference for the law of the place of rendition of the services can be altered to a state that has a more significant relationship to the parties and the transaction. *Id.* at 631. The Court found that since West Virginia had more substantial contact with the transaction, its law should apply. *Id.*

We believe the reasoning in *Tac & C Energy* is unique to that particular situation. The *Restatement's* preference for the place of rendition of the services can be distinguished from the instant case by the nature of the contract in question. An employment contract centers around the specific services which are to be performed at a place of business. Absent a state with a more significant connection, the state where the services are to be performed is the most likely candidate to govern that contract. That reasoning does not exist in the present situation involving insurance policy interpretation, and thus, does not govern our choice of law analysis.

Commentary B to the *Restatement* explains the language of § 193, noting that normally, the policy will be solicited, delivered, and executed in the same state where the insured is domiciled and the insured risk located. In the present case, however, not only are there multiple states identified where the risks insured under the policy are located, but the place of contract and the place of the insured risk are different. Thus, we turn to § 6 of the Restatement for guidance.

Section 6 of the *Restatement* sets forth the following factors to consider, specifically providing that:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

After reviewing the factors found in § 6 of the *Restatement*, we are of the opinion that the law of the state of the contract should apply. We believe that "certainty, predictability and uniformity of result," as

well as "ease in the determination and application of the law to be applied" is essential to the interpretation of an insurance policy when the law is not otherwise chosen by the parties. Given the increasingly complex nature of the insurance industry, we believe that the needs of the "interstate" system of insurance require that law be applied in the most uniform and predictable manner possible.[7] Although we recognize that, in this case, both West Virginia and Ohio have significant relationships to the transaction, the policy was bargained for, created, and agreed to in New Jersey by both parties. We do not believe the insurance company demonstrated any reasonable expectation at the time the contracts were entered into that any litigation over the policy would be based upon West Virginia law.

Quite simply, we believe that, absent specific provisions to the contrary, it is infinitely more practicable to permit one policy to cover the numerous contracts rather than to require both Triangle and the insurance companies to negotiate individual policies based upon each state where an insured risk is located.[8] When carefully weighed, we conclude that the factors tilt in favor of the law of the place of contract.

Consequently, in a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the

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7. *See generally,* Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal,* 57 S.Cal.L.Rev. 745 (1984); Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy,* 17 Idaho L. Rev. 497 (1981).

8. *See Independent PetroChemical Corp. v. Aetna Casualty & Surety Co.,* 674 F.Supp. 354, 356-57 (D.D.C. 1987), in which the district court held that the state in which negotiation and formation occurred has the most substantial interest in seeing its laws applied to the conduct of the parties negotiating for insurance in its jurisdiction.

parties, or the law of the other state is contrary to the public policy of this state.[9]

Because the first certified question has been answered in the negative, the second certified question shall not be addressed. The case is remanded to the Federal District Court for the Northern District of West Virginia.

Certified question answered;
case remanded.

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9. *See Paul v. National Life Insurance Co.*, ___W.Va. ___, 352 S.E.2d 550, 556 (1986).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 23, 1992

No. 91-1685
CA-88-41-W-K

Liberty Mutual Ins v. Triangle Industries

MANDATE

The judgment of this Court dated 3/2/92 takes effect today.

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 24, 1992

CA-88-W-K

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

v.

TRIANGLE INDUSTRIES, INCORPORATED, a/k/a ANC Holdings, Incorporated; TRIANGLE PWC, INCORPORATED
Defendent & Third Party Plaintiffs-Appellants

v.

NEW JERSEY PROPERTY-LIABILITY GUARANTY ASSOCIATION, on behalf of Ideal Mutual Insurance Company, in liquidation; ZURICH-AMERICAN INSURANCE COMPANIES; ZURICH INSURANCE COMPANY
Third Party Defendants-Appellees

and

WAUSAU INSURANCE COMPANIES; EMPLOYERS INSURANCE OF WAUSAU
Third Party Defendants

WESTINGHOUSE ELECTRIC CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORATION; OLIN CORPORATION; AMERICAN FIBER MANUFACTURERS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION
Amici Curiae

No. 91-1685

ORDER

Appellants have filed a motion to recall and stay the mandate, appellees filed responses in opposition to the motion and appellants filed a reply in support of the motion.

The Court denies the motion.

Entered at the direction of Judge Niemeyer, with the concurrence of Chief Judge Ervin and Judge Shedd, United States District Judge, sitting by designation.

For the Court,

/s/ Bert M. Montague
ACTING CLERK

[Triangle PWC, Inc.]
New Brunswick, New Jersey 08903

May 14, 1979

Reply To:
1701 Wheeling Avenue
Glen Dale, West Virginia

Jim Carnes
Cravat Coal Company, Inc,
Box 157
Holloway, Ohio 43985

Subject: Buckeye Reclamation Company
Sludge Disposal

Jim,

The following is a typical analysis presented to us by Lancy – ERC Labs Inc., on our neutralized sludge, which is considered, non-toxic, inert metallic oxides and hydroxides and essentially similar to earth in composition.

	Total
Chromium Cr	0.01 %
Zinc Zn	1.26 %
Iron Fe	3.80 %
Cadmium Cd	0.001%
Copper Cu	0.001%
Calcium Ca	4.05 %
Cyanide Cn	0.001%
Lead Pb	0.004%

Based on the above analysis this material may be classilied, as non toxic, non hazardous, non liquid which could be classified as a solid, suitable for disposal in your landfill operation.

Sincerely,

/s/ Kenneth E. Pickett

Kenneth E. Pickett
Envr. Control Manager

cc: P. Sidhu
R. Nelson
D. Springfield

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC., successor to Morton Thiokol Inc., now named Thiokol Corporation, *Plaintiff-Petitioner,*	:	CIVIL ACTION
v.	:	ON PETITION FOR CERTIFICATION
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *Defendant-Respondent* and LIBERTY MUTUAL INSURANCE COMPANY, AFFILIATED FM INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, FIRST STATE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, UNDERWRITERS AT LLOYDS, LONDON, *Defendants-Respondents,* and AETNA CASUALTY & SURETY COMPANY, ET. AL, *Defendants.*	:	FROM THE FINAL JUDGEMENT OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION Sat. Below: Superior Court, Appellate Division Judges King, Cohen and Stern, J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX OF MORTON INTERNATIONAL, INC.

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Attorneys for Petitioner Morton International, Inc.

By: George F. Kugler, Jr.
Edward C. Laird

I. STATEMENT OF THE MATTER INVOLVED

Eight years ago, this Court provided New Jersey's seminal guidance on environmental law in its decision in *DEP v. Ventron Corp.*, 94 N.J. 473 (1983). This is the insurance case arising out of *Ventron* and presents the Court with a similar opportunity to issue critical guidance in the field of environmental insurance law.[1]

Twelve years ago, Judge Lester, after fifty-five (55) trial days over a seven (7) month period, held in the underlying *Ventron* case that "the court cannot find that the acts were done with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur." (Pa 0465).[2]

Four years ago, in 1987, Judge Huot, on the same record, held on *summary judgment* in this insurance coverage action, that "[t]his Court disagrees with Judge Lester's findings in the above quoted passage with respect to intent. . . . The damage was expected and intended. . . ." (Pa 0041-0042). The Appellate Division affirmed Judge Huot by erroneously evaluating the insured's waste disposal practices against a standard used for determining intent in child molestation cases. Thus, the insured was summarily dismissed on the issue of intent by the Courts of this State without *one day* of trial even though it has succeeded in the underlying action on the same issue after *55 days* of trial. The Appellate Division's decision revolutionizes the determination of coverage disputes in New Jersey and threatens to emasculate comprehensive general liability coverage for insureds throughout the State.

Petitioner, Morton, Ventron's successor in interest, brought this suit in 1985 against the insurers that covered Ventron from 1960 to 1976, seeking indemnity and defense costs. The defendant insurers then moved

---

1. Estimated final costs for the Berry's Creek clean-up are projected to be in the millions of dollars.

2. The record references are to plaintiff's appendix submitted to the Appellate Division on the appeal below.

for summary judgment against Morton on the issues of both indemnity and duty to defend[3]. Judge Huot heard that motion, and despite his reliance on the record of the underlying trial, rejected Judge Lester's findings and concluded as a matter of law that Ventron and its predecessors were substantially certain that their mercury processing operations would cause harmful mercury pollution of Berry's Creek and the surrounding area.[4] He thereby foreclosed Morton from obtaining the benefits of insurance coverage for which Ventron and its predecessors had paid substantial premiums for many years.

Morton also sought summary judgment on defense costs on the ground that the DEP's complaint clearly included on its face claims that fell within the four corners of the applicable insurance policies. Judge Huot, recognizing that at least a part of the complaint fell within the applicable General Accident policies, partially granted Morton's summary judgment motion and ruled that General Accident had a duty to defend the DEP's claims in the underlying suit. As a result of this ruling, a damage trial was held to quantify General Accident's liability. This trial resulted in a judgment on behalf of Morton and against General Accident for $100,429.07

---

3. The motion for summary judgment made by the carriers required the trial court to construe, among other things, policy language which, depending on the policy period in question, expressed coverage as a function of "accident" or in the terms of an "occurrence" (*i.e.*, whether injury was expected or intended from the insured's standpoint). The Appellate Division construed the term "accident" in accordance with its decision in *Broadwell Realty Servs. Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super 516 (App. Div. 1987).

4. In its own cross-motion for summary judgment seeking indemnity Morton asserted that Judge Lester's findings in the underlying action eliminated any genuine issue of fact and compelled judgment in plaintiff's favor. The Appellate Division, contrary to Morton's intention and existing precedent, took Morton's cross-motion as an indication that the parties had stipulated all the material facts of this dispute.

(for early defense of the DEP claim) and $40,000 in attorneys' fees incurred in prosecuting the present action.

In affirming Judge Huot's ruling on indemnity, the Appellate Division stated that the precise controlling theory for ascertaining intent was "obscure, if not uncertain," but nonetheless applied on objective standard. It then concluded that the insured intended the consequences of its disposal activities because it "must have been substantially certain" that its disposal activities would cause the consequences that followed. (Slip. Op. at 46). In reaching that conclusion, the Appellate Division inferred intentional consequences from the intentional character of the acts of disposal. This panel thus placed itself in direct conflict with other Appellate Division precedent,[5] as well as the views of at least two Justices of the New Jersey Superme Court and the weight of authority throughout the country.[6] This analysis took the Appellate Division so far that it equated the non-assaultive business behavior of Ventron and its predecessors with the intentional sexual molestation of children.

The Appellate Division also found that, despite the unquestioned existence of claims that fell within the four corners of the insurance policies, no carrier was obligated to defend any of the claims brought in the underlying action or reimburse Morton for the costs incurred. Although recognizing the oft-repeated New

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5. *See SL Indus. v. American Motorists Ins. Co.*, 248 N.J. Super. 458 (App. Div. 1991), *certif. granted*, ____ N.J. ____ (Sept. 16, 1991) (No. 33,848) and *Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619 (App. Div.), *certif. denied*, 122 N.J. 395 (1990).

6. *See Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 486-492 (1978) (Pashman, J. and Handler, J., concurring). *See also id.* at 494 (Clifford, J., dissenting). The concurring opinion expressed the appropriate standard as follows: "[An insured] should be charged with intent to injure . . . only if that was his subjective desire." 76 N.J., at 489.

Jersey law that the duty to defend is broader than the duty to pay, the Appellate Division concluded that whenever the carrier disputes the existence of an occurrence, it is entitled to sit on the sidelines, force the insured to incur the huge financial burden of defending the underlying litigation, compel the insured to spend more money to try to establish coverage, and reimburse the insured, if at all, only if the coverage action is resolved favorably to the insured. This, for all intents and purposes, deprives the insured of a defense under its policy and clearly is contrary to its reasonable expectations.

This decision thus strikes at the very heart of two of the most critical issues in environmental insurance law; namely, the issue of intent and the duty to defend. Left standing, this decision portends ominous consequences for insureds throughout the State of New Jersey whether they be business entities, private individuals, or governmental bodies. Therefore, on October 22, 1991, Morton filed its Notice of Petition for Certification from the Appellate Division's judgment.

II. QUESTIONS PRESENTED

1. In an insurance coverage action where intention of the insured is a critical issue to be decided, did the trial court and the Appellate Division erroneously engage in fact-finding on a summary judgment motion?

2. Was it proper for the Appellate Division to equate the standard for determining intent in an environmental insurance case involving non-assaultive business behavior (waste disposal) with the standard used in child molestation cases?

3. Is the insured's duty to defend an environmental claim under a comprehensive general liability policy only triggered at the time a duty to indemnify is established in a subsequent coverage action?

4. In insurance coverage litigation, is the carrier estopped from challenging the results of the underlying case where: first, it had notice of the matter; second, it

had opportunity to defend; and third, the underlying case decided the same factual issue (intent) that is central to the insurance coverage action?

Depending upon how the Court answers the foregoing questions, the following additional issues may need to be addressed:

5. When does a liability carrier's duty to defend terminate?

6. Is the insured entitled to recover its full counsel fees expended in the action establishing the duty to defend?

7. In the event a liability carrier is obligated to defend only a portion of a complaint, does the burden of allocation of defense costs rest on the carrier?

8. Did Judge Huot and the Appellate Division err in preventing Morton from pursuing discovery of policy drafting history?

SUPREME COURT OF NEW JERSEY
C-629 September Term 1991
34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Petitioner,
v.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,
Defendant-Respondent
and
LIBERTY MUTUAL INSURANCE COMPANY et al.,
Defendants-Respondents,
and
AETNA CASUALTY & SURETY COMPANY et al.,
Defendants.

ON PETITION FOR CERTIFICATION

Filed March 8, 1992

CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-895-89T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of March, 1992.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

/s/
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
Docket No. 34,341

	:	*Civil Action*
	:	
MORTON INTERNATIONAL, INC., successor to Morton-Thiokol, Inc., now named Thiokol Corporation, *Plaintiff-Appellant,*	:	CROSS PETITION FOR CERTIFICATION FROM JUDGMENT OF APPELLATE DIVISION
	:	
	:	App. Div. Docket No.
vs.	:	A-895-89T3
	:	
	:	SAT BELOW:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.,* *Defendants-Respondents*	:	Honorable Michael P. King
	:	Honorable Richard S. Cohen
	:	Honorable Edwin H. Stern

CROSS PETITION FOR CERTIFICATION OF DEFENDANTS-RESPONDENTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE CO., LIBERTY MUTUAL INSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKETS INSURANCE COMPANIES

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[Listing of Counsel Continued on Back of Cover]

PRELIMINARY STATEMENT

In the event that this Court denies petitioner's request for certification, this cross petition will be moot. However, if this Court grants certification, the respondents respectfully urge the Court to address the following issues of importance to both insurers and insureds in this State: (1) the "pollution exclusion"; (2) "late notice"; (3) "pre-existing loss"; and (4) "as damages".[1]

---

1. Respondent American Home Assurance Company joins in this cross petition only as to the pollution exclusion. Respondents Liberty Mutual Insurance Company, Underwriters at Lloyd's London and the London Markets Insurance Companies do not join in the cross petition as to late notice.

Across the country, Supreme Courts of other states have addressed and are addressing the issues presented in this appeal. These decisions, however, have applied the law of their particular jurisdiction. Respondents respectfully submit that it is important for the New Jersey Supreme Court to address these same issues, since this Court has yet to do so.

At the outset, respondents emphasize that the Appellate Division correctly decided that there was no coverage for the underlying claims because there was no accident or occurrence. However, in doing so, the Appellate Division declined to correct its prior erroneous decisions with respect to the pollution exclusion, and indeed, the Appellate Division reaffirmed its prior rulings on this exclusion. These prior erroneous decisions need to be corrected by this Court.

Respondents ask this Court to address the "pollution exclusion," and in particular, to rule that the pollution exclusion applies to the *discharge* of pollutants and not to the *damage* that results from a discharge. Another important issue is whether the term "sudden," which is contained in the pollution exclusion has a temporal meaning. To date, the vast majority of courts from other jurisdictions and the clear trend of decisions across the country apply the pollution exclusion to the discharge and construe the word "sudden" as having a temporal element that precludes coverage for discharges of pollutants that take place over a gradual period of time.

Notwithstanding, lower courts of this state have continued to follow the outmoded precedent of the Appellate Division with respect to the pollution exclusion, which precedent is contrary to the view of the substantial majority of jurisdictions that have addressed the issue. In fact, the respondents in this appeal asked the Appellate Division to correct these prior rulings; the Appellate Division declined to do so, but expressly left it for this Court to clarify the law. (Opinion at 49, fn1)

Apart from the foregoing, certain petitioners also respectfully request, should this Court take this appeal,

that the Court address the issues of "late notice", "pre-existing loss" and "as damages".

Respondents note that the case at bar is but one of a large number of environmental coverage actions pending in the courts of this State. The decision of this Court on the foregoing issues will settle the law in New Jersey as to these crucial legal questions and will undoubtly assist both the courts below and the litigants in clearing many pending matters from the dockets.

SUPREME COURT OF NEW JERSEY
C-630 September Term 1991
34,341

MORTON INTERNATIONAL, INC., etc.,
Plaintiff-Cross-Respondent,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,
Defendants-Respondents.

and

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants-Cross-Petitioners,

and

AETNA CASUALTY & SURETY COMPANY, et al.,
Defendants.

ON CROSS-PETITION FOR CERTIFICATION

FILED
MAR 3 1992

CLERK

To the Appellate Division, Superior Court:

A cross-petition for certification of the judgment in A-895-89T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the cross-petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of March, 1992.

/s/
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/

CLERK OF THE SUPREME COURT
OF NEW JERSEY

No. 91-1685
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,	:	
Plaintiff/Appellee,	:	On Appeal from the
	:	Final Judgment of
vs.	:	the United States
	:	District Court for
TRIANGLE INDUSTRIES, INC. AND TRIANGLE PWC, INC.,	:	the Northern
	:	District of West
Defendants/Appellants,	:	Virginia in Civil
	:	Action No.
vs.	:	88-41-W-K
	:	
WAUSAU INSURANCE COMPANY, et al,	:	
Third-party Defendants/Appellees	:	

LIBERTY MUTUAL INSURANCE COMPANY'S, OPPOSITION TO THIRD-PARTY PLANTIFFS/ APPELLANTS' MOTION TO RECALL AND STAY THE MANDATE

PRELIMINARY STATEMENT

On March 23, 1992, this Court issued a Mandate effectuating its March 2, 1992 judgment in this matter. In its March 2, 1992 Opinion, this Court affirmed the judgment of the United States District Court for the Northern District of West Virginia, and held that under New Jersey law the "original" pollution exclusion clause in some of the insurance policies issued by Liberty Mutual Insurance Company, Zurich Insurance Company and Ideal Mutual Insurance Company (the "Insurers") to Triangle Industries, Inc. and Triangle PWC, Inc. ("Triangle") barred coverage for environmental damage alleged to arise from regular disposal in a landfill

of the waste products of a standard manufacturing process. *Liberty Mutual Ins. Co. v. Triangle Ind. et al.*, No.

In addition, to the extent that there is any inconsistency between the *CPC International* decision and this Court's March 2, 1992 judgment, it is the role of the U.S. Supreme Court to determine which decision is correct. Pursuant to Supreme Court Rule 13, the period for Triangle to petition for Certiorari has not yet expired. Triangle will thus not suffer injustice if this Court's Mandate remains in place.

CONCLUSION

For the foregoing reasons, Insurers respectfully request that this Court deny Triangle's Motion to Recall and Stay the Mandate in this case.

Respectfully submitted,

/s/ LEE H. GLICKENHAUS

Lee H. Glickenhaus
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No. 91-1945

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRIANGLE INDUSTRIES, INC
A/K/A ANC HOLDINGS, INC.,
TRIANGLE PWC, INC.,
PETITIONERS,
v.
LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, ON BEHALF OF
IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counsel for Respondent
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Guaranty Association, on behalf of
Ideal Mutual Insurance Company

Questions Presented.

I. Whether the United States Court of Appeals for the Fourth Circuit, with full knowledge of the holding of the United States Court of Appeals for the First Circuit in *CPC International Co.* v. *Northbrook Excess and Surplus Insurance Co.*, and of the grant of certification by the New Jersey Supreme Court in *Morton International Inc.* v. *General Accident Insurance Co. of America*, properly exercised its discretion in denying Petitioner's Motion to Recall and Stay its Mandate in the case below?

II. Whether the United States Court of Appeals for the Fourth Circuit properly applied the standards articulated by this Court in *Salve Regina College* v. *Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1222 (1991) and *Commissioner of Internal Revenue* v. *Bosch's Estate*, 387 U.S. 456 (1967), in predicting how, as a matter of state law, the New Jersey Supreme Court would construe the "pollution exclusion" in the Comprehensive General Liability ("CGL") insurance policies issued to Triangle Industries?

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Argument 6

I. This court should refuse to grant the petition for certiorari and disturb the finality of the mandate of the United States Court of Appeals for The Fourth Circuit because there is no "inter-circuit" conflict on an issue of Federal Law, and because petitioners have failed to show that the Fourth Circuit has improperly considered or predicted how the New Jersey Supreme Court would rule on a question of State Law. 6

A. Petitioners have failed to show that there is an "inter-circuit" conflict between decisions of United States Courts of Appeal or other special and important reasons for this Court to grant certiorari. 6

B. This Court should not disturb the Fourth Circuit's mandate because there is no guarantee that the New Jersey Supreme Court in *Morton* will rule on the effect of the pollution exclusion clause in CGL policies and even if it were certain that that Court would rule on the clause's effect, it is probable that it would, in conformity with the Fourth Circuit's prediction, determine that the clause applies to the discharge of pollutants as opposed to the damage that results from a discharge. 9

II. "Persuasive data" establishes that the Fourth Circuit correctly predicted the New Jersey Supreme Court would hold that the pollution exclusion excludes coverage for intentional, long-term waste disposal. 12

A. New Jersey rules of contract interpretation. 14

B. The Fourth Circuit had ample authority for disregarding "incorrect" State Court decisions regarding the pollution exclusion. 15

C. The New Jersey Supreme Court would, at a minimum, conclude that "sudden and accidental" applies to the release of pollution and not to any resulting property damage. 17

D. The Fourth Circuit properly determined that the New Jersey Supreme Court would hold that the releases of Triangle's sludge at the Buckeye Landfill were not sudden and accidental. 19

Conclusion 27

Table of Authorities Cited.

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Alphin v. Henson, 552 F.2d 1033, 1035 (4th Cir. 1977), *cert. denied*, 434 U.S. 823 (1977) 9

American Iron and Steel Institute v. EPA, 560 F.2d 589, 594 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) 9, 10

American Motorists Ins. Co. v. General Host. Corp., 667 F. Supp. 1423, 1428 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991) 23

American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) 22n

Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. App. 1981) 22n

Borden Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd without op.*, 865 F.2d 1267 (6th Cir. 1989), *cert. den.*, 493 U.S. 817 (1989) 15, 16

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C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265 (D. Mass. 1989) 23

Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967) 13

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Covenant Ins. Co. v. Friday Engineering, Inc., 742 F. Supp. 708, 1990 U.S. Dist. LEXIS 10,821 (D. Mass. 1990) 19n

CPC International Co. v. Northbrook Excess and Surplus Insurance Co., Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992) 3, 8, 19n

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Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986) 19n, 21n

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Hudson Ins. Co. v. Double D Mgmt. Co., No. 89-1631-CIV-T-17B (M.D. Fla. June 28, 1991) 19n

International Minerals & Chemical Corp. v. Liberty Mutual Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 758, (Ill. Ct. App. 1st Dist. 1988), *appeal denied*, 122 Ill. 2d 576, 530 N.E.2d 246 (Ill. 1988) 18n, 23, 25, 26n

Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412, 416 (D.C. Cir. 1986) 10

Jonesville Products, Inc. v. Transamerica Ins. Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986), *app. den.*, 428 Mich. 897 (1987) 16

Lansco, Inc. v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520, 88 A.L.R. 3d 172 (Ch. Div. 1975), *aff'd*, 145 N.J. Super 433, 368 A.2d 363 (App. Div. 1976), *certif. den.*, 73 N.J. 57, 372 A.2d 322 (1977) 20

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Liondale Bleach, Dye & Paint Works v. Riker, 85 N.J.L. 426, 429, 89 A. 929, 931 (1914) 20n

Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 582 A.2d 1257 (1990) 14

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No. 91-

In the

Supreme Court of the United States

OCTOBER TERM, 1991

TRIANGLE INDUSTRIES, INC.,
A/K/A ANC HOLDINGS, INC.,
TRIANGLE PWC, INC.,
PETITIONERS,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, ON BEHALF OF
IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Liberty Mutual Insurance Co. and New Jersey Property/Liability Insurance Guaranty Association, on behalf

of Ideal Mutual Insurance Company, in liquidation respectfully request that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on March 2, 1992.

Statement of the Case.

This is a declaratory judgment action to determine whether petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively "Triangle"), are entitled to insurance coverage under certain policies issued to them by Liberty Mutual Insurance Company ("Liberty Mutual")[1] and Ideal Mutual Insurance Company[2] ("Ideal") (collectively the "Insurers" or "Respondents"). The "pollution exclusion" found in many of the policies issued to Triangle provides that the policies do not apply to property damage:

> Arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Petition for Writ of Certiorari, A 7-8.

[1] In accord with Sup. Ct. Rule 29.1, Liberty Mutual states that it only has wholly-owned subsidiaries.

[2] Represented in this action by the New Jersey Property Liability Guaranty Association (NJPLIGA).

The complaint was originally filed by Liberty Mutual in the United States District Court for the District of West Virginia. Triangle then brought third-party actions against Zurich Insurance Company, Ideal and Wausau Insurance Company.[3] After adequate time for discovery, the parties filed cross-motions for summary judgment. The District Court granted the Insurers' motions, finding that the various pollution exclusions in Liberty Mutual's, Zurich's and Ideal's policies excluded coverage to Triangle. On March 2, 1992, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Judgment, holding that the "accidental" portion of the pollution exclusion clause in the policies applies to the discharge of pollutants as opposed to the resulting damage, and that the pollution exclusion therefore bars coverage for environmental damage alleged to arise from the regular, long-term disposal of industrial waste in a landfill. On April 24, 1992, the Fourth Circuit, with full knowledge of both the New Jersey Supreme Court's grant of Certification in *Morton International, Inc.* v. *General Accident Insurance Co. of America*, Docket No. 34,341 (N.J. Sup. Ct., *certif. granted*, March 2, 1992), and the decision of the First Circuit Court of Appeals in *CPC International Co.* v. *Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992), denied Petitioners' Motion to Recall and Stay the Fourth Circuit's Mandate filed on March 23, 1992.

The facts of this case are essentially as set forth in Petitioner's Statement Of The Case.

[3] Wausau has settled out of this case and the issues raised by this Petition do not apply to Zurich.

Summary of Argument.

I. THIS COURT SHOULD REFUSE TO GRANT CERTIORARI AS THERE IS NO "INTER-CIRCUIT" CONFLICT ON AN ISSUE OF FEDERAL LAW OR OTHER SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI.

Contrary to Triangle's contention, conflict among circuits is not a reason for granting certiorari with respect to questions controlled by *state* law. The issues involved on this case involve only state law concerning the interpretation of insurance contracts. If there is any conflict between the Fourth Circuit's decision in this case and the First Circuit's decision in *CPC International Co., supra.*, it is on an issue of *state* as opposed to *federal* law. Petitioners do not contend that the Fourth Circuit applied the *Salve Regina* test improperly in reaching its decision as to how the New Jersey Supreme Court would rule on the effect of the pollution exclusion; they are simply unsatisfied with the Fourth Circuit's *result*. Without other special or important reasons, which Petitioners have failed to show exist, this Court has no reason to grant certiorari.

II. THE NEW JERSEY SUPREME COURT'S GRANT OF CERTIFICATION IN THE MORTON CASE DOES NOT PRESENT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

The *Morton* case may or may not decide some of the same issues that the Fourth Circuit decided in this case. It would be unwarranted, however, for this Court to grant certiorari and disturb the Fourth Circuit's Mandate on the mere possibility that the New Jersey Supreme Court may now rule differently on insurance coverage issues than has the Fourth Circuit.

Even were it certain that the New Jersey Supreme Court would definitively rule on the pollution exclusion clause in *Morton*, it is highly probable that that Court would rule as the Fourth Circuit has predicted and find that the "exception" to the pollution exclusion clause applies to the discharge of pollution and not the resulting damage. The Fourth Circuit considered and rejected the same argument advanced by Petitioner with respect to the *Morton* case and exercised its discretion in denying Petitioner's Motion to Recall and Stay the Mandate. Petitioners make no claim that the Fourth Circuit abused its discretion in so doing. There is no reason for this Court to upset the finality of the Fourth Circuit's decision.

III. This Court Must Deny Certiorari Because The Fourth Circuit Properly Predicted How the New Jersey Supreme Court Would Rule On An Issue of State Law.

The Fourth Circuit relied on established New Jersey rules of contract interpretation and other "persuasive data" in predicting that the New Jersey Supreme Court would hold that the pollution exclusion excludes coverage for intentional, long-term waste disposal. The Fourth Cireuit properly determined that the New Jersey Supreme Court would ignore decisions of lower New Jersey courts to the contrary.

Petitioners challenge the *result* reached by the Fourth Circuit not the *process* by which this result was reached. Petitioners do not contend that the Fourth Circuit failed to follow the mandate of *Salve Regina*. Rather, Petitioners seek to have this Court review the decision of the Fourth Circuit on a matter of *state law*. Absent a claim that the result was reached in a *manner* prohibited by federal law, as articulated by *Salve Regina*, this Court must deny the Petition.

Argument.

I. This Court Should Refuse to Grant the Petition for Certiorari and Disturb the Finality of the Mandate of the United States Court of Appeals for the Fourth Circuit Because There Is No "Inter-Circuit" Conflict on an Issue of Federal Law, and Because Petitioners Have Failed to Show That the Fourth Circuit Has Improperly Considered or Predicted How the New Jersey Supreme Court Would Rule on a Question of State Law.

A. *Petitioners Have Failed to Show That There Is an "Inter-Circuit" Conflict Between Decisions of United States Courts of Appeal or Other Special and Important Reasons for This Court to Grant Certiorari.*

A review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. Rule 10.1. A petition for a writ of certiorari is only to be granted where there are special and important reasons. *Id.* One such reason may be where a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter of federal law. Sup. Ct. Rule 10.1(a).

The very authority relied upon by Triangle in seeking certiorari supports denial of its Petition. The case of *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860, 861 (1938), cited by Triangle provides:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely a permissible difference of opinion in the state courts.

The *Ruhlin* Court continued that a reason for granting certiorari exists where the Circuit Court "has decided an important question of local law in a way probably in conflict with applicable local decisions." *Id.*

This sentence suggests that certiorari is appropriate only where a Circuit Court has used an improper *method* in reaching a decision. As contemplated by *Ruhlin*, this can occur if the Circuit Court fails to follow controlling state law. In this case, neither the Fourth Circuit (or the First Circuit in the *CPC International* case) had controlling state law to follow. Indeed, the Court was attempting to predict what such law would be. This Court can only take cognizance of the Fourth Circuit's decision then if it followed an impermissible procedure in making this prediction. The method a federal court must follow in predicting how a state Supreme Court will rule on a question has most recently been set out by this Court in *Salve Regina College* v. *Russell*, ___ U.S. ___, 111 S.Ct. 1217 (1991). Under *Salve Regina*, the Fourth Circuit is permitted to disregard the decisions of New Jersey intermediate courts if it predicts that the New Jersey Supreme Court would also do so. Triangle does not contend that the Fourth Circuit failed to follow *Salve Regina*, or that its process or method was otherwise flawed. Triangle disputes only the *result*.

There is simply no "inter-circuit" conflict between the decision of the First Circuit in *CPC International* and the Fourth Circuit's decision in this case on an issue of *federal* law. Instead, both the First Circuit and the Fourth Circuit applied the standards articulated by this Court in *Salve Regina* and *Bosch's Estate*, in predicting how the New Jersey Supreme Court would rule on different issues of *state* law.

There may not even be a conflict of state law. The First Circuit in *CPC International* held that were the New Jersey Supreme Court to consider the question it would find the term "sudden" in the pollution exclusion clause means unexpected

and unintended and does not have a temporal component. *CPC International*, 1992 U.S. App. Lexis 5342 at p. 16. On the other hand, the Fourth Circuit, in its decision, did not determine whether the term "sudden" has a temporal component, but held that the word "accidental" in the pollution exclusion clause in CGL policies applies to the *discharge* of pollution as opposed to the *damage* that results from a discharge and bars coverage for unintended environmental damage alleged to arise from the regular disposal in a landfill of industrial waste. There is no "inter-circuit" conflict as to how the New Jersey Supreme Court would interpret the term "sudden." The Fourth Circuit's decision did not address this word.

Even if, as Petitioners contend, the Fourth Circuit and First Circuit did rule differently on the exact same issue of state law this would not create an "inter-circuit" conflict on a question of *federal* law. Rather it would merely indicate different federal courts, using the same test, reaching different predictions of how a state court would decide a *state* law question. This type of "inter-circuit" conflict is not one over which this Court has jurisdiction. Triangle is simply dissatisfied with the result that the Fourth Circuit reached in making its prediction on a state law question. That dissatisfaction does not translate into a reason why this Court should grant certiorari.

Petitioners have offered no other special or important reasons why this Court should grant the Petition. Accordingly, this Court should deny the Petition.

B. *This Court Should Not Disturb the Fourth Circuit's Mandate Because There Is No Guarantee That the New Jersey Supreme Court in Morton Will Rule on the Effect of the Pollution Exclusion Clause in CGL Policies and Even of it Were Certain That That Court Would Rule on the Clause's Effect, it Is Probable That it Would, in Conformity With the Fourth Circuit's Prediction, Determine That the Clause Applies to a Discharge of Pollutants as Opposed to the Damage That Results From a Discharge.*

Triangle argues that since the New Jersey Supreme Court has granted certification in the *Morton* case, this Court should grant certiorari and take the extraordinary step of staying the Mandate of the Fourth Circuit. Triangle contends that "it would be anomalous and unfair" were Liberty Mutual to prevail in this case based upon the "fortuitous circumstance" that the Fourth Circuit rendered its opinion in this case before a decision in the *Morton* case. *Petition for Writ of Certiorari* at 12. As discussed below, however, there is no unfairness to Triangle because the Fourth Circuit fairly decided this case and there was nothing wrong with the procedures applied in doing so.

In essence, Petitioners are looking only for *another chance* to get the outcome they were unsuccessfully able to obtain from the Fourth Circuit. Petitioners seek this Court to stay this case rather than to review it on the merits. The Fourth Circuit considered the very arguments advanced by Petitioners and exercised its discretion in denying Petitioners' Motion to Recall and Stay the Mandate. In so doing, the Fourth Circuit relied on the well-recognized rule that recall of a Mandate by a court of appeals is an extraordinary remedy, one to be used only sparingly in special circumstances, where "good cause" has been shown or to prevent injustice. *American Iron and Steel Institute* v. *EPA*, 560 F.2d 589, 594 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *Alphin* v. *Henson*, 552 F.2d

1033, 1035 (4th Cir. 1977), *cert. denied*, 434 U.S. 823 (1977); *Greater Boston Television Corporation* v. *F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). The authority to recall a Mandate falls within the discretion of a court of appeals and such discretion is ordinarily employed to recall a Mandate only in highly unusual circumstances. *American Iron*, 560 F.2d at 594. There must be a special reason for recall to override the strong policy of repose, that there be an end to litigation. *Johnson* v. *Bechtel Associates Professional Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986). As the Sixth Circuit has indicated, to justify recall:

> there must be exceptional circumstances shown, which in the opinion of the Court are sufficient to override the strong public policy that there should be an end to a case in litigation, that when the judgment therein becomes final the rights or liabilities of the parties therein are fully determined, and that the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy . . . Otherwise a successful litigant would never have repose in the use of what he has obtained through such litigation.

Hines v. *Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958). The importance of bringing an orderly end to litigation demands that recall not be liberally allowed. *Powers* v. *Bethlehem Steel Corporation*, 483 F.2d 963, 964 (1st Cir. 1973), *cert. denied*, 414 U.S. 856 (1973). Petitioners do not suggest that the Fourth Circuit abused its discretion in refusing to stay the Mandate; there is accordingly no basis for this Court to upset the Fourth Circuit's decision and stay its Mandate now.

The issues in this case (which go beyond those raised in the *Morton* case) have been fully and fairly litigated. The Fourth Circuit reached its decision upon full consideration of the facts and law and by application of the proper rules of decision. Nothing casts the propriety of this decision in doubt. Petitioner confuses "disappointment" with "injustice"; while it may be disappointed with the result in this case, there is no "injustice" to holding it to the judgment. Future decisions always have the possibility of changing the rules of existing decisions. This, however, is not a sufficient reason to grant certiorari to review or stay the existing decision.

In *Morton International, Inc.* v. *General Accident Insurance Co. of America*, No. A-895-89T3 (App. Div. October 2, 1991), the New Jersey Appellate Division held that damages resulting from mercury contamination of an insured's property and a nearby creek were not the result of an "accident" or "occurrence" as defined in the policyholder's CGL insurance policies and that coverage under the policies was thus barred. The court did not rule directly on the effect of the "pollution exclusion" clause and in particular whether the clause applies to the *discharge* of pollutants or to the *damage* that results from a discharge. Nor did the court determine whether the term "sudden" in the clause has a temporal component. While Liberty Mutual and other insurers have asked the New Jersey Supreme Court to review the "pollution exclusion", there is no guarantee that that Court will rule on the clause's effect.

Thus, while it is possible that the New Jersey Supreme Court, as a result of its decision to hear the *Morton* case, will provide definitive guidance as to the meaning of the pollution exclusion clause, it is equally possible that that court will rely on the New Jersey Appellate Division's denial of coverage on the basis of lack of an accident or occurrence and not interpret the pollution exclusion clause. Triangle's contention that "[i]n *Morton*, the New Jersey Supreme Court will be deciding [the

effect of the "pollution exclusion" clause] in the near future" is thus not entirely accurate. *Petition for Writ of Certiorari* at 13. It would be unwarranted for this Court to disturb the strong interest in finality of litigation and disturb the Fourth Circuit's Mandate on the mere possibility that New Jersey may rule differently on insurance coverage issues than has the Fourth Circuit.

Moreover, even if it is certain that the New Jersey Supreme Court will definitively rule on the pollution exclusion clause in *Morton*, it is highly probable that that Court will rule as the Fourth Circuit has predicted that it would and find that the "exception" to the pollution exclusion clause applies to the discharge of pollution and not the resulting damage. Accordingly, the New Jersey Supreme Court's grant of Certification in *Morton* does not present sufficient justification for this Court to grant certiorari.

II. "Persuasive Data" Establishes That the Fourth Circuit Correctly Predicted the New Jersey Supreme Court Would Hold That the Pollution Exclusion Excludes Coverage for Intentional, Long-Term Waste Disposal.

Triangle urged the Fourth Circuit to follow the path set by New Jersey intermediate appellate courts and hold that the "sudden and accidental" exception to the pollution exclusion applies only if Triangle actually expected or intended to cause property damage through its waste disposal. The Fourth Circuit declined to so rule, indicating that the "pollution exclusion" bars coverage for environmental damage alleged to arise from the planned and regular landfill disposal of waste over the course of years. *Liberty Mutual Ins. Co.* v. *Triangle Ind. et al.*, No. 91-1685, Slip op. at 3 (4th Cir. March 2, 1992).

Petitioner challenges the *result* reached by the Fourth Circuit; it does not challenge the *process* by which this result was reached. Petitioner does not contend that the Fourth Circuit failed to follow the mandate of *Salve Regina*. Rather, Petitioner seeks to have this Court review the decision of the Fourth Circuit on a matter of *state law*. Absent a claim that the result was reached in a *manner* prohibited by federal law, as articulated by *Salve Regina*, this Court must deny the Petition.

While the Fourth Circuit was obligated to give deference to the intermediate Appellate Courts of New Jersey, these decisions were not binding on it. The Fourth Circuit was charged with the duty of determining how the New Jersey Supreme Court would resolve this issue:

> Moreover, even in diversity cases this Court has further held that while the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the state has not spoken on the point. And in *West* v. *AT&T Co.*, this Court further held that "an intermediate appellate state court . . . is datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise*.

Commissioner of Internal Revenue v. *Estate of Bosch*, 387 U.S. 456, 465 (1967) (citations omitted, emphasis in original).

In reaching its decision, the Fourth Circuit relied on persuasive data establishing that the New Jersey intermediate courts' approach to the pollution exclusion is fundamentally flawed because they hold that the "sudden and accidental" exception to the pollution exclusion applies to the *property damage*

caused by a release of contamination, not to the *release* itself, in derogation of the plain language of the exclusion.[4] "Persuasive data" was also presented to the Fourth Circuit that the New Jersey courts' approach was flawed because these courts have equated "sudden and accidental" with "expected or intended" and have entirely failed to give "sudden" its plain and ordinary temporal meaning of "abrupt" or "rapid". The Fourth Circuit did not reach this issue.

Because these decisions are not consistent with established New Jersey law regarding the interpretation of contracts, the Fourth Circuit properly determined that they would not be followed by the New Jersey Supreme Court.

A. *New Jersey Rules of Contract Interpretation*

The fundamental premise of New Jersey contract law is that contracts must be given a reasonable interpretation. *Matter of Community Medical Center*, 623 F.2d 864 (3rd Cir. 1988) (New Jersey law). In New Jersey, the words of an insurance policy are to be given their ordinary and usual meaning, and in the absence of ambiguity, New Jersey courts are not to engage in a "strained construction to support the imposition of liability." *Longobardi* v. *Chubb Ins. Co. of N.J.*, 121 N.J. 530, 582 A.2d 1257 (1990); *Brynildsen* v. *Ambassador Ins. Co.*, 113 N.J. Super. 514, 274 A.2d 327 (1971). As one New Jersey court has stated, courts should not "write for the insured a better policy of insurance than the one purchased." *Walker Rogge, Inc.* v. *Chelsea Title & Guar. Co.*, 116 N.J. 517, 529, 562 A.2d 208, 214 (1989).

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[4] These New Jersey intermediate courts have generally held that the pollution exclusion is merely a "restatement" of the definition of "occurrence" in the policies. The policies define an occurrence as "bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Petition for Writ of Certiorari* at A-7.

Moreover, "effect, if possible, will be given to all parts of the instrument and the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." *Prather* v. *American Motorists Ins. Co.*, 2 N.J. 496, 67 A.2d 135, 138 (1949); *New Wrinkle, Inc.* v. *John L. Armitage & Co.*, 238 F.2d 753 (3rd Cir. 1956).

Following these guideposts, the Fourth Circuit properly determined that the New Jersey Supreme Court would conclude that: 1) "sudden and accidental" applies to the *release* of pollution, not any resulting property damage; and 2) deliberate dumping of waste on a regular basis over the course of many years is not "sudden and accidental" within the meaning of the pollution exclusion.

B. *The Fourth Circuit Had Ample Authority For Disregarding "Incorrect" State Court Decisions Regarding the Pollution Exclusion.*

Other federal courts interpreting the pollution exclusion clause have engaged in the same analysis and reached the same result as the Fourth Circuit. In *Borden Inc.* v. *Affiliated FM Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd without op.*, 865 F.2d 1267 (6th Cir. 1989), *cert. den.*, 493 U.S. 817 (1989), the District Court for the Southern District of Ohio was faced with the question of how the Ohio Supreme Court would interpret the term "sudden and accidental" in the pollution exclusion. A state appeals court had found that, where the insured did not intend the damage caused by hazardous waste, the release was "sudden and accidental". *See Buckeye Union Ins. Co.* v. *Liberty Solvents & Chemicals Co., Inc.*, 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984). The *Borden* court, while noting that the *Buckeye* decision was entitled to some deference, rejected this decision because it was persuaded

that the Ohio Supreme Court would not "twist" the meaning of the unambiguous term "sudden and accidental" to provide insurance coverage. *Borden*, 682 F. Supp. at 930. The court added that the insured's deliberate and long term disposal of hazardous substances was "precisely the type of activity which the pollution exclusion was drafted to preclude." *Id.*

In *FL Aerospace* v. *Aetna Cas. & Surety Co.*, 897 F.2d 214 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 284 (1990), the Court of Appeals for the Sixth Circuit was faced with the question of whether the pollution exclusion clause bars coverage for a long term disposal of hazardous substances. Although Michigan's Supreme Court had not yet ruled on the pollution exclusion, several state appellate court decisions had found that the pollution exclusion clause did not apply if damage was "unexpected" or "unintended" *See, e.g., Jonesville Products, Inc.* v. *Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986), *app. den.*, 428 Mich. 897 (1987). The court, applying settled Michigan principles of insurance contract interpretation, found that the term "sudden and accidental" was not ambiguous and that the Michigan Supreme Court would give this term its plain, everyday meaning which includes a temporal component. *FL Aerospace*, 897 F.2d at 219-20.

Similarly, in *State of New York* v. *Amro Realty Corp.*, 697 F. Supp. 99 (N.D.N.Y 1988), *aff'd in part, rev'd in part*, 936 F.2d 1240 (2d Cir. 1991), the District Court in New York predicted that the New York Court of Appeals would reject lower court opinions which applied the pollution exclusion only where the insured expected or intended to cause environmental harm. The *Amro* court was right — in *Technicon Elecs. Corp.* v. *American Home Assurance Co.*, 74 N.Y. 2d 66, 544 N.Y.S. 2d 531, 542 N.E.2d 1042 (1989), New York's high court found the pollution exclusion unambiguous and rejected the lower courts' decisions.

C. *The New Jersey Supreme Court Would, at a Minimum, Conclude that "Sudden and Accidental" Applies to the Release of Pollution and Not to Any Resulting Property Damage.*

By its plain terms, the "sudden and accidental" exception to the pollution exclusion applies to the "discharge, dispersal, release, or escape" of pollutants, not any resulting damage. Regardless of what meaning the New Jersey Supreme Court would ascribe to the words "sudden and accidental", it is clear that they apply to the discharge of pollutants and not to the resulting damage. The pollution exclusion is not susceptible of a reasonable reading that the words "sudden and accidental" modify the damage that results from the release of pollutants. Accordingly, the Fourth Circuit properly predicted that the New Jersey Supreme Court would not follow the lower court decisions but would, at a minimum, conclude that the words "sudden and accidental" refer to the *release* of the pollutant itself.

While there has been disagreement in reported cases concerning the meaning of the words "sudden and accidental", cases outside of New Jersey are in general accord that these words apply to the release of pollutants, not the resulting harm. *Lumbermens Mut. Cas. Co.* v. *Belleville Indus., Inc.*, 407 Mass. 675, 679, 555 N.E.2d 568 (1990) ("The sudden event to which the exception in the pollution exclusion applies concerns neither the cause of the release or the damage caused by the release. It is the release itself that must have occurred suddenly, if the exception is to apply so as to provide coverage."); *Technicon Elecs. Corp.* v. *American Home Assurance Co.*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989) ("[T]he pollution exclusion clause at issue here is directed at the polluting act itself — the discharge, dispersal or escape."); *Transamerica Ins. Co.* v. *Sunnes*, 77 Or. App. 136,

141, 711 P.2d 212 (1985), *rev. den.*, 301 Or. 76, 717 P.2d 631 (1986), ("The exception to the exclusion clause is concerned only with whether the discharge or release of pollutants is accidental or intended and not with whether the resulting damage was also intended".) Numerous other cases have joined in this fundamental holding.[5] Most recently, in *New Castle County* v. *Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1169 (3d Cir. 1991), the Third Circuit wrote:

> By its own terms, the pollution exclusion clause forecloses coverage for damage caused by the discharge of pollutants, unless "such discharge, dispersal, release or escape is sudden and accidental." However, in holding that the County's claim fits within the "sudden and accidental" exception, the district court focused on whether the pollution damage was sudden and accidental. We think that the court, as the plain language of the pollution exclusion suggests, should have inquired whether the discharge of the pollutants from Tybouts Corner was both sudden and accidental. Based on our reading of the record facts, we believe that this shift of focus from damage to discharge may change the outcome of the case.

[5] *See, e.g., Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) ("The focus of the pollution exclusion is on the discharge or release of pollutants into the environment."); *International Minerals & Chemical Corp.* v. *Liberty Mutual Ins. Co.*, 168 Ill. App. 3d 361, 522 N.E.2d 758, (Ill. Ct. App. 1st Dist. 1988), *appeal denied*, 122 Ill. 2d 576, 530 N.E.2d 246 (Ill. 1988) ("Whereas the general insuring provision focuses only on the damage and the pollution exclusion clause focuses on the event or activity as well as on the nature of the damage, the exception is concerned only with the event or activity — the discharge, dispersal, release or escape of pollutants.").

Although the Third Circuit found that "sudden" meant "unexpected", it unequivocally held that the phrase "sudden and accidental" refers to the release of pollutants and not the resulting damage.

The Fourth Circuit was required to determine, as would the New Jersey Supreme Court, whether the releases of pollution at the Buckeye Landfill were "sudden and accidental". The Fourth Circuit reasonably determined that in order to give effect to the plain meaning of all the words it was necessary for the term "sudden and accidental" to apply to the release of pollutants and not the resulting damage. Petitioner has offered no indication as to why the Fourth Circuit's determination was unreasonable or not in accord with the standards of *Salve Regina* and *Bosch's Estate*.

D. *The Fourth Circuit Properly Determined That the New Jersey Supreme Court Would Hold That the Releases of Triangle's Sludge at the Buckeye Landfill Were Not Sudden and Accidental.*

In order to establish that it was entitled to coverage under the pollution exclusion in the CGL policies at issue, Triangle had to establish that the releases of pollutants at the Buckeye Landfill were *both* sudden *and* accidental.[6] Because the Fourth Circuit properly predicted that the Supreme Court of New Jersey would find that, pursuant to the plain meaning of the

[6] The burden of establishing that the releases were sudden and accidental is on the policyholder. *Cooper Development Co.* v. *Employers Ins. of Wausau*, 765 F. Supp. 1429 (N.D. Cal. 1991); *CPC Int'l Inc.* v. *Northbrook Excess and Surplus Ins. Co., supra; Fischer & Porter Co.* v. *Liberty Mutual Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986); *Fireman's Fund Ins. Co.* v. *Ex-Cell-O Corp., supra; Covenant Ins. Co.* v. *Friday Engineering, Inc.*,, 742 F. Supp. 708 1990 U.S. Dist. LEXIS 10,821 (D. Mass. 1990); *Hudson Ins. Co.* v. *Double D Mgmt. Co.*, 768 F.Supp. 1542 (M.D. Fla. 1991); 19 Couch on Insurance 2d §79.385.

words "sudden" and "accidental", Triangle did not meet this burden, the Fourth Circuit properly ruled in favor of the Insurers.

1. The Releases Of Triangle's Sludge At The Buckeye Landfill Were Not "Accidental".

By its plain meaning an "accident" is a discrete fortuitous event which happens within a short time at a specific time and place. Indeed, even one of the cases relied upon by Triangle in its Petition for a Writ of Certiorari held that "accidental" means "happening unexpectedly or by chance, taking place not according to the usual course." *Lansco, Inc.* v. *Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520, 88 A.L.R. 3d 172 (Ch. Div. 1975), *aff'd*, 145 N.J. Super 433, 368 A.2d 363 (App. Div. 1976), *certif. den.*, 73 N.J. 57, 372 A.2d 322 (1977).[7] This is consistent with the plain meaning of the word "accident" which generally means a fortuitous and unexpected event, happening by chance alone.[8] In its ordinary usage, "accidental" is contrasted with "intentional"

[7] New Jersey courts have found that the term "accident" had a limited temporal character. One of the leading cases to consider what constitutes harm "caused by accident" is *U.S. Radium Corp.* v. *Globe Indemnity Co.*, 13 N.J. Misc. 316, 178 A. 271 (1935), *aff'd*, 116 N.J.L. 90, 182 A. 626 (1936). The New Jersey Supreme Court held that the injury resulting from exposure to radium over the course of four years was not "caused by accident."

Other New Jersey cases are in accord with *Globe Indemnity*. *See, e.g., Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479, 491, 161 A.2d 479, 485-86 (1960). In *Liondale Bleach, Dye & Paint Works* v. *Riker*, 85 N.J.L. 426, 429, 89 A. 929, 931 (1914), the New Jersey Supreme Court held that "where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is 'no injury by accident.'" The specific time and occasion requirement set forth in *Liondale* is so well-established in New Jersey that it has been characterized as a "time-honored test," *Ptak* v. *General Electric Co.*, 13 N.J. Super. 294, 298, 80 A.2d 337, 339, *aff'd*, 16 N.J. Super. 573, 85 A.2d 214 (1951), and as a "long accepted definition." *Harden* v. *Morris Basin Dry Docks Co.*, 23 N.J. Super. 48, 52, 92 A.2d 148, 150 (1952); *see also Roberts* v. *Beitler*, 34 N.J. Super. 470, 475-76, 112 A.2d 797, 800 (1955).

[8] *Webster's Third New Intermediate Dictionary* (1966).

or "deliberate." This view of "accident" has been endorsed by numerous "pollution exclusion" cases.[9]

Applying the plain meaning of the word "accidental", the Fourth Circuit predicted that the New Jersey Supreme Court would find that the regular dumping of Triangle's sludge directly onto the ground at the Buckeye Landfill over the course of several years was not "accidental". Indeed, the record below established that dumping of this sludge was entirely *deliberate*; it is precisely what Triangle arranged for and what it expected to happen. Fourth Circuit Joint Appendix at 440-451, 452-457. Triangle consigned this waste to a hauler with the knowledge and understanding that it would be dumped at the Buckeye Landfill. Moreover, Triangle arranged for the sludge to be "open dumped" — that is dumped directly on the ground without being placed in any containers. *Id.* at 816.

In light of the fact that approximately 20,000 tons of sludge was open dumped, there was no basis for Triangle to assert that it did not expect or intend that this sludge would be "released" into the environment. The releases of this sludge into the environment were not "without previous notice . . . unforeseen; unexpected . . ." (*Lansco's* definition of "sudden"), nor did they happen "unexpectedly or by chance; taking place not according to the usual course." (*Lansco's* definition of "accidental".) The record clearly demonstrates that the releases of Triangle's sludge into the environment were *expected* and *by design*; they clearly *did* take place "according to the usual course of things." Thus, even under the definitions endorsed by the Lansco court, these releases were not "sudden and accidental". Because the dumping of Triangle's sludge at the Buckeye Landfill was an intentional act which was carried

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[9] *See, e.g., Waste Management of Carolinas, Inc.* v. *Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (N.C. 1986); *Fischer & Porter Co.* v. *Liberty Mutual Ins. Co.*, 656 F.Supp. 132 (E.D. Pa. 1986) (a "regular, routine business operation" is not an accident).

on over a long period of time the Fourth Circuit correctly found that it was not "accidental".[10]

2. The Releases Of Triangle's Sludge At The Buckeye Landfill Were Not "Sudden".

Triangle's argument is premised on the New Jersey intermediate Courts' determination that "sudden and accidental" means "expected or intended" and that the pollution exclusion is merely a restatement of the "occurrence" definition. This approach is fundamentally flawed in two ways: 1) it fails to accord "sudden" its plain and ordinary temporal meaning of abrupt or rapid; and 2) in so doing, it effectively reads the word "sudden" out of the policies.

Both of these flaws are in direct contravention of established New Jersey contract interpretation law. Accordingly, the New Jersey Supreme Court would decline to follow these decisions and would, rather, conclude that "sudden" includes a temporal meaning and the pollution exclusion is not a mere restatement of the "occurrence" definition.

Both the plain meaning of the word "sudden", and its use in conjunction with the word "accidental", compel a conclusion that it must be given a temporal meaning. Numerous courts have had the opportunity to construe the word "sudden" in the context of the pollution exclusion. Most of them have identified the same elements in determining whether a release of pollutants is "sudden." These courts have concluded:

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[10] *See Great Lakes Container Corp.* v. *National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984) (no coverage where contamination was result of insured's ordinary operations); *American States Ins. Co.* v. *Maryland Casualty Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (exclusion intended to eliminate coverage for "the emissions of pollutants as a regular or continuous part of the insured's business"); *Barmet of Indiana, Inc.* v. *Security Ins. Group*, 425 N.E.2d 201 (Ind. App. 1981) (emissions insured knew would continue as part of its business operations not sudden and accidental); *U.S. Fidelity & Guaranty Co.* v. *Star Fire Coals Inc.*, 856 F.2d 31 (6th Cir. 1988) (same).

> The definition of "sudden" is not a subjective definition, but an objective one. Even if "sudden" is not limited to an instantaneous happening, it must still be on brief notice, and must be unexpected. No use of the word "sudden" or "suddenly" could be consistent with an event which happened gradually or over an extended period of time, nor could it be consistent with an event which was anticipated or predictable.

American Motorists Ins. Co. v. *General Host. Corp.*, 667 F. Supp. 1423, 1428 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991). Other courts echo this view:

> "Sudden" is understood in its ordinary, most common and most popular sense, to have a temporal significance. Webster's dictionary defines "sudden" as "happening without previous notice or with very brief notice"; "abrupt": "characterized by and manifesting hastiness"; *Webster's Third New International Dictionary*, (1976) and we decline to ignore these temporal focused definitions. . . .

International Minerals & Chem. Corp. v. *Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 522 N.E.2d 758 (App. Ct. 1988). *See also Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) ("sudden" in the pollution exclusion includes the temporal component of abruptness and means "brief, momentary, or lasting only a short time"); *C.L. Hauthaway & Sons Corp.* v. *American Motorists Ins. Co.*, 712 F. Supp. 265 (D. Mass. 1989) ("the term 'sudden' within the context of a pollution exclusion encompasses quite clearly a temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity.") *Lumbermens Mut. Cas. Co.*

Mut. Cas. Co. v. *Belleville Indus., Inc.*, 407 Mass. 675, 555 N.E.2d 568 (1990) ("The issue is whether the release was sudden. The alternative is that it was gradual. . . . [o]nly an abrupt discharge or release of pollutants falls within the exception"). Numerous decisions support the proposition that ongoing, regular or continuous discharges of pollutants into the environment cannot, in any way, be classified as "sudden."

3. The Pollution Exclusion Does Not Restate The "Occurrence" Definition

Triangle argues that the pollution exclusion is simply a restatement of the definition of "occurrence." The few cases that have reached this result have correctly been subject to extreme criticism.[11] There is simply no basis in New Jersey law, or in logic, for equating the words "sudden and accidental" with the words "expected or intended".

The gravaman of Triangle's argument (and of the cases upon which it relies) is that the word "sudden" is ambiguous because it has dictionary definitions which encompass both a temporal concept of abruptness and the sense of unexpectedness. Merely having two dictionary meanings, however, does not render a word ambiguous. *See, e.g., Upjohn* v. *New Hampshire Ins. Co.*, 197, 207, 476 N.W.2d 392, 397 (Mich. Sup. Ct. 1991), at 208-209, fn. 8 (noting that if the mere existence of multiple dictionary definitions rendered a word ambiguous, "it would be virtually impossible to write a contract that was unambiguous"). "Sudden", like most words in the English language, may have different meanings depending on the context in which it is

[11] *United States Fidelity & Guar. Co.* v. *Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988) ("specifically, we believe that District Court erred when it treated the pollution exclusion and the "occurrence" definition to be interchangeable"); *United States Fidelity & Guar. Co.* v. *Murray Ohio Mfg. Co.*, 693 F. Supp. 617 (M.D. Tenn 1988), *aff'd.*, 875 F.2d 868 (6th Cir. 1989) ("The [pollution] exclusion clause is not a mere restatement of the definition of occurrence"); *Morton Thiokol, Inc.* v. *General Accident Ins. Co. of America*, No. C-3956-85 (NJ. Super. Ct., Law Div., Bergen Co., August 27, 1987).

used. *But context is everything*. For example, in the abstract, "bolt" can mean either a lock or hasty flight, "pen" a writing implement or enclosure for animals and "shot" a discharge of a weapon or a drink of whiskey. In context, however, the meaning of each is clear and there is no ambiguity.

The same is true of "sudden". Appearing in the conjunctive with "accidental", which *itself* means "unexpected", it is clear that the temporal meaning of sudden (hasty, abrupt) must control in order to avoid a redundancy which negates part of the contract. The exclusion refers to releases which are "sudden and accidental." Clearly, to give meaning to this phrase, "sudden" must mean something *beyond* "accidental" or "unexpected". The context is the key. See *Lumbermens Mut. Cas. Co.* v. *Belleville Indus. Inc., supra* at 680, 681, ("for the word 'sudden' to have any significant purpose, and not to be surplusage when used generally in conjunction with the word 'accidental', it must have a temporal aspect to its meaning, and not just the sense of something unexpected."); *Northern Ins. Co.* v. *Aardvarks Assoc., Inc.*, 942 F.2d 189 (3rd Cir. 1991) ("To read 'sudden and accidental' to mean only unexpected and unintended is to rewrite the policy by one important pollution coverage requirement — abruptness of the pollution discharge. The very use of the words 'and accidental' reveals a clear intent to define the words differently, stating two separate requirements.") (emphasis in original).

New Jersey law requires that *every word* in the policies be given effect; the policy may not be read so as to render any word or term surplusage. *Prather, supra*. Interpreting "sudden" as "unexpected" renders it synonymous with "accidental" and reads the word "accidental" out of the policy. If Triangle's interpretation is followed, the pollution exclusion will not apply

to releases which are "accidental and accidental". The absurdity of this result is self evident.[12]

[12] Interpreting "sudden" as "unintended and unexpected" renders it synonymous with "accidental", as that term is employed in the policy and thus, the word "accidental" can be read out of the exception as nothing more than redundant surplusage. Such a reading does not comport with fundamental rules of contract construction requiring that to the extent possible, all words used in a contract be given effect.

International Minerals and Chem. Co. v. Liberty Mutual Ins. Co., *supra*, at 769.

Conclusion.

For the reasons specified above, this Court should refuse to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in this matter and should refuse to stay the proceedings of the Fourth Circuit.

Respectfully submitted,

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No. 91-1945

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

TRIANGLE INDUSTRIES, INC.,
a/k/a ANC HOLDINGS, INC.;
TRIANGLE PWC, INC.,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, on behalf of
IDEAL MUTUAL INSURANCE COMPANY, in liquidation,

Respondents.

SUPPLEMENTAL BRIEF AND APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively referred to as "Triangle" or "Petitioners"), submit this Supplemental Brief and Appendix to invite this Court's attention to the recent decision of the Supreme Court of Appeals of West Virginia in *Joy Technologies, Inc. v. Liberty Mutual Insurance Company,* Docket No. 88-C-96-F (June 11, 1992), attached as an Appendix hereto at 1-b, in which that Court, in reliance upon the statements made by Liberty Mutual Insurance Company ("Liberty Mutual") in hearings conducted before the Commissioner of Insurance of the State of West Virginia, found the "sudden and accidental" exception language in the pollution exclusion clause of a Comprehensive General Liability ("CGL") policy to mean "unexpected and unintended," with regard to the pollution "damage," rather than the pollution "release." *Id.* Hence, where the pollution damage was unexpected and unintended, the sudden and accidental exception to the pollution exclusion clause operates to provide coverage.

In finding coverage for the insured in the *Joy Technologies* case, the Supreme Court of Appeals of West Virginia adopted one of the arguments advanced by Triangle in *Liberty Mutual Insurance Company v. Triangle Industries, Inc.,* ____ W. Va. ____, 390 S.E.2d 562 (1990)[1], as well as the findings of the Commissioner of Insurance for the State of West Virginia. 12-b through 14-b.

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1. The same argument which the Supreme Court of Appeals of West Virginia adopted in *Joy Technologies* was advanced by Triangle when it was before that court. The court declined to reach the issue, however, because it determined that New Jersey law governed the interpretation of the relevant insurance policy language.

Thus, the Supreme Court of Appeals of West Virginia has held in *Joy Technologies* that Liberty Mutual, a party both to this case and *Morton International Inc. v. General Accident Insurance Co. of America,* Docket No. 34,341 (certif. granted, March 2, 1992), currently pending before the Supreme Court of New Jersey, is bound by its own interpretation of the policy language in dispute in this case, an issue which was fully and fairly adjudicated before the Commissioner of Insurance of the State of West Virginia and again before the Supreme Court of Appeals of West Virginia in *Joy Technologies.* Accordingly, the doctrine of offensive collateral estoppel, announced by this Court in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), applies to bar Liberty Mutual from relitigating the policy language at issue in this case in any other adjudication in which it is a party.

ARGUMENT

POINT 1

LIBERTY MUTUAL IS COLLATERALLY ESTOPPED BY THIS COURT'S DECISION IN *PARKLANE HOSIERY, CO. INC. v. SHORE* FROM RELITIGATING AN ISSUE WHICH WAS RESOLVED AGAINST IT BY THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IN THE RECENT CASE OF *JOY TECHNOLOGIES, INC. v. LIBERTY MUTUAL INSURANCE COMPANY.*

The seminal case of *Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), involved a successful attempt by Respondents, the stockholders of Parklane Hosiery Co. Inc. ("Parklane") to assert offensive collateral estoppel against Petitioner, Parklane, to bar it from relitigating the question of whether its proxy statement was materially false and misleading, an issue which this Court

determined to have been "fully and fairly" litigated in an earlier suit by the Securities Exchange Commission ("SEC") against Parklane, involving the same language in the proxy statement. *Parklane,* 439 U.S. at 323, 99 S.Ct. at 647, 58 L.Ed.2d at 553.[2]

The Court has broad discretion to determine when offensive collateral estoppel should be applied. *Parklane,* 439 U.S. at 322, 99 S.Ct. at 651, 58 L.Ed.2d at 553; *General Dynamics Corp. v. American Tel. & Tel. Co.,* 650 F.Supp. 1274, 1282 (N.D. Ill. 1986) *Certif. granted, amended, General Dynamics Corp. v. American Tel. & Tel. Co.,* 658 F.Supp. 417 (N.D. Ill. 1987). The underlying purpose of this doctrine is to avoid affording a litigant "*more than one* full and fair opportunity for judicial resolution of the same issue." *Parklane,* 439 U.S. at 328, 99 S.Ct. at 650, 58 L.Ed. 2d at 558 (emphasis added). In *Parklane,* this Court ultimately held that:

> Since [Parklane] received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that [Parklane is] collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

Parklane, 439 U.S. at 333, 99 S.Ct. at 652, 58 LE.D. 2d at 563.

The United States District Court for the Northern District of Illinois articulated a four-part test for determining whether the doctrine is applicable to a given situation:

> When a plaintiff seeks to offensively, collaterally estop a defendant from relitigating certain issues, the plaintiff must establish that[:] (1) the party against whom the estoppel is asserted was a party, to

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2. This Court granted *certiorari* in *Parklane* because of an inter-circuit conflict. *Id.* at 326, 649, 554.

> the prior litigation; (2) the issues were actually litigated and decided on the merits in the earlier suit; (3) the resolution of the particular issues was necessary to the court's judgment; and (4) the issues in the prior suit are identical to those raised in the subsequent suit.

General Dynamics, 650 F.Supp. at 1291, *citing Falconer v. Meehan,* 804 F.2d 72 (7th Cir. 1986); *Kunzelman v. Thompson,* 799 F.2d 1172, 1178 (7th Cir. 1986); *Garza v. Henderson,* 779 F.2d 390, 392-93 (7th Cir. 1985); and *County of Cook v. MidCon Corp.,* 773 F.2d 892, 898-99 (7th Cir. 1985).

Generally, in addition to reviewing the elements of a plaintiff's proofs described above, the court should consider "whether application of collateral estoppel would be *substantially unfair* to the party to be estopped." *General Dynamics,* 650 F.Supp. at 1282 (emphasis added). According to the district court in *General Dynamics,* the "fairness" considerations include the following: (a) the ability of the party asserting collateral estoppel to join in the prior action; (2) incentive to litigate in the prior action; (3) any indication that the first court, at least in patent cases, failed to grasp the issues fully; (4) the existence of judgments inconsistent with the prior judgment; and (5) whether the party to be estopped had a "full and fair opportunity to litigate the issue in the prior action." *Id.* at 1282, *citing,* among others, *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 650-51, 58 L.Ed.2d 552 (1979).

POINT 2

LIBERTY MUTUAL IS ESTOPPED FROM CONTRADICTING ITS OWN INTERPRETATION OF THE SUDDEN AND ACCIDENTAL EXCEPTION TO THE POLLUTION EXCLUSION CLAUSE WHICH IT SUBMITTED TO THE COMMISSIONER OF INSURANCE OF THE STATE OF WEST VIRGINIA AND WHICH WAS THEN RELIED UPON BY THE COMMISSIONER IN APPROVING THE LANGUAGE AT ISSUE IN THIS CASE FOR INCLUSION IN INSURANCE POLICIES.

In the instant case, Petitioner is seeking to estop Respondent, Liberty Mutual, from relitigating an issue which Liberty Mutual previously litigated and lost. There is virtually no difference between the language of the Liberty Mutual policy discussed by the Court in *Joy Technologies,* 5-b, and the language of Liberty Mutual's policy in this case. *See* Triangle's *Petition for Writ of Certiorari* at 4-5. The issue in both cases is whether the sudden and accidental exception to the pollution exclusion clause applies when the pollution "damage" is neither expected nor intended, or when the "release" of the pollution is neither expected nor intended.

In *Joy Technologies,* the Court relied on Liberty Mutual's interpretation of the policy language, as adduced from its own internal records and the position it asserted before the Commissioner of Insurance for the State of West Virginia. 12-b.

In one of its own interoffice memoranda, Liberty Mutual described the policy language at issue as follows:

> Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's *waste disposal.* Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the

> water intake of down stream industrial sites, the Denora Pa. atmospheric contamination, and the like.

11-b (emphasis and brackets in original).

In addition, before the exclusion clause could be legally incorporated into the standard form CGL policy in West Virginia, it had to be approved by the West Virginia Insurance Commissioner. 12-b. In the resulting hearings before the Commissioner of Insurance, Liberty Mutual expressly relied upon the following language of the Insurance Rating Board of the Insurance Service Office of which Liberty Mutual is a member:

> Coverage for pollution or contamination is not provided in most cases under present policies because the *damages* can be said to be *expected* or *intended* and thus are excluded by the definition of occurrence. The above exclusion [the exclusion which is in issue in the present case] clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . .

12-b through 13-b (emphasis added, brackets in original). The landmark New Jersey case of *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super 516, 534, 528 A.2d 76 (App. Div. 1987) quoted and relied on the very same language in holding that unexpected and unintended pollution damage was covered under an identical CGL policy. *Id.* at 534 (quoted in footnote 1). Based upon this language from the Insurance Rating Board and the extensively cited decisional law, the New Jersey Appellate Division in *Broadwell* held:

> In our view, the pollution exclusion focuses upon the intention, expectation and foresight of the insured. If an insured knows that liability incurred by a foreseeable polluting event is covered by his policy,

> he is tempted to diminish his precautions and relax his vigilance. Conversely, we perceive no sound basis anchored in the policy language which requires prescience or clairvoyance on the part of the insured. Where the insured has taken reasonable precautions against contaminating the environment and the dispersal of pollutants is both accidental and unforeseen, we are of the view that the "sudden and accidental" exception to the exclusion is applicable and the loss is thereby covered by the policy.

Id. at 535.

In *Joy Technologies,* the Court also relied on submissions from the Commissioner of Insurance who presided over the hearings in which Liberty Mutual participated:

> The insurers stated in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so. Based upon those representations, I concluded that the pollution endorsement forms did not narrow or limit coverage and, instead, were mere clarifications of existing coverage as defined and limited by the definition of the term "occurrence." Accordingly, I approved the endorsement forms IRB 335 and MIRB MB G008 submitted respectively by the Insurance Rating Board and the Mutual Insurance Rating Bureau.

13-b (emphasis added).

In the written Order of the Commissioner approving the identical pollution exclusion language at issue in this case, an Order from which no appeal was taken, he stated:

> (1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as

> defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached;
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions.

14-b. Although this Order is from an administrative agency and not the result of a judicial proceeding, this court has ruled that such an Order is entitled to be accorded preclusive effect. *United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-1560, 16 L.Ed.2d 642 (1966); *United States v. Karlen,* 645 F.2d 635, 638 (8th Cir. 1981); and *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation,* 46 Geo. Wash. L. Rev. 65 (1977). In addition, the decision in *Joy Technologies* is clearly appropriate for the application of offensive collateral estoppel under the *Parklane* doctrine since it was a full adversarial proceeding.

The Court in *Joy Technologies* ultimately determined:

> In view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, coverage which included the injuries in the present case, this Court must conclude that the *policies issued by Liberty Mutual covered pollution damage,* even if it resulted over a period of time and was gradual, *so long as it was not expected or intended.*

15-b (emphasis added) (*citing,* among other cases, *Broadwell Realty Services Inc. v. Fidelity & Casualty Co.,* 218 N.J. Super. 516 (App. Div. 1987)).

Liberty Mutual has had ample opportunity to fairly and fully adjudicate the interpretation of the policy language at issue in these cases. It should now be bound by those adjudications. Triangle could not have been made a party to the decision in *Joy Technologies,* so it must endeavor to prevent Liberty Mutual from making a contrary argument in the instant case; Liberty Mutual is also attempting to make a contrary argument in *Morton International Inc. v. General Accident Insurance Co. of America,* Docket No. 34,341 (certif. granted, March 2, 1992). It is likely that petitioners in *Morton,* who are also "insureds" of Liberty Mutual, will also endeavor to offensively collaterally estop Liberty Mutual from succeeding on that issue. Hence, if this Court chooses not to reverse the Fourth Circuit in this matter, it must at least stay the proceedings pending the New Jersey Supreme Court's ruling.

The doctrine of offensive collateral estoppel, as enunciated in *Parklane,* is clearly applicable to Liberty Mutual in this case. When one compares this case with *Parklane* for the purpose of applying the doctrine of offensive collateral, it is evident that: (1) Liberty Mutual stands in the shoes of Parklane; (2) the Commissioner of Insurance for the State of West Virginia stands in the shoes of the SEC; and (3) Triangle stands in the shoes of Shore and the other stockholders. Liberty Mutual is in the same position occupied by Parklane, in that it has had opportunities to litigate the "sudden and accidental" language at issue, both before the Commissioner of Insurance of West Virginia and before the Supreme Court of Appeals of West Virginia in *Joy Technologies.* In addition, the issue is again being litigated, both in this case and before the Supreme Court of New Jersey in *Morton International, Inc. v. General Accident Insurance Co. of America,* Docket No. 34,341 (certif. granted, March 2, 1992).

In order to avoid the inequity of allowing Liberty Mutual to relitigate the "sudden and accidental" language of the pollution exclusion clause, which Liberty

Mutual previously affirmatively stated to the West Virginia Commissioner of Insurance, was to be interpreted to provide coverage in circumstances identical to those presented in this case, this Court should accept jurisdiction over this matter and issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit reversing the Circuit Court's ruling under the offensive collateral estoppel doctrine. In the alternative, this Court should issue the Writ and then stay the proceedings pending the decision of the New Jersey Supreme Court in Morton, a decision which will finally and ultimately decide the meaning of "sudden and accidental" under the law of the State of New Jersey, the law which the Supreme Court of Appeals of the State of West Virginia determined should apply in this case.

CONCLUSION

For the reasons set forth above in this Supplemental Brief filed pursuant to *Sup. Ct. R.* 15.7, Petitioners respectfully request this Court to issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit in this matter, and to stay the proceedings, pending the decision in Morton.

In the alternative, the Writ should be issued and the decision of the Fourth Circuit reversed because the doctrine of Offensive Collateral Estoppel, as enunciated in *Parklane,* serves to bar Liberty Mutual from relitigating the CGL policy language at issue in this case which has previously been fully and fairly adjudicated before the Commissioner of Insurance of West Virginia and again before the Supreme Court of Appeals of West Virginia in the *Joy Technologies* case.

Respectfully submitted,

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Dated: July 6, 1992

APPENDIX

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1992 Term

No. 20153

JOY TECHNOLOGIES, INC.,
Plaintiff Below, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants Below, Appellee

Appeal from the Circuit Court of Mercer County
Honorable John R. Frazier, Judge
Civil Action No. 88-C-96-F

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 21, 1992
Filed: June 11, 1992

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JUSTICE BROTHERTON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state." Syllabus, *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, ____ W.Va. ____, 390 S.E.2d 562 (1990).

2. The public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies.

Brotherton, Justice:

This is an appeal by Joy Technologies, Inc.,[1] from an order entered by the Circuit Court of Mercer County on June 26, 1990. That order granted Liberty Mutual Insurance Company[2] partial summary judgment in an action brought by Joy Technologies for indemnification for certain pollution claims which had been paid by Joy Technologies. Liberty Mutual had issued commercial general liability policies to Joy Technologies which had obligated it to defend and indemnify Joy for liability claims for personal injury and property damage. It, however, refused to indemnify Joy on the pollution claims involved in the present case on the ground that an exclusion clause contained in certain of its policies excluded coverage for such claims. The circuit court, in

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1. Hereinafter variously also referred to as "Joy Technologies" or "Joy".

2. Also referred to as "Liberty Mutual".

granting Liberty Mutual summary judgment, in essence, found that the exclusion clause precluded coverage for pollution damage unless the pollution was "sudden and accidental." In reaching that conclusion, it appears that the circuit court, relying upon the holding of this Court in *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, ____ W. Va. ____ , 390 S.E.2d 562 (1990), applied the law of Pennsylvania, which indicates that the exclusion clause in question relieves an insurer of liability unless the pollution was "sudden and accidental."

On appeal, Joy Technologies claims that West Virginia had a more significant relationship with the parties in this case than Pennsylvania and that, under the circumstances, and under the holding in *Liberty Mutual Insurance Company v. Triangle Industries, Inc., Id.*, the law of West Virginia rather than the law of Pennsylvania should have been applied in resolving the issues raised. It also claims that under West Virginia law the exclusion clause should be construed to preclude liability of the insurer only when pollution damage was expected or intended by the insured.

After reviewing the questions presented and the record, this Court agrees with Joy Technologies' assertions. Accordingly, the judgment of the Circuit Court of Mercer County is reversed.

The facts in this case show that Joy Technologies, Inc., is a successor of Joy Manufacturing Company. Joy Manufacturing Company was a Pennsylvania corporation with executive offices in Pennsylvania and with a facility in West Virginia.

In 1968, Joy Technologies, Inc., purchased a manufacturing plant in Bluefield, West Virginia. Joy utilized the facility for cleaning and rebuilding mining machinery. Joy sold the plant in 1980 and moved its operations to Bluefield, Virginia. Joy continues to employ a number of West Virginia residents in its Bluefield, Virginia, operations.

In cleaning and repairing mining machinery at its West Virginia facility, Joy utilized oil containing polychlorinated biphenyls or "PCBs." The same type of oil had been utilized at the facility before Joy purchased it.

In the 1970's, concerns arose over the potential environmental hazards of PCBs, and in the mid-1970's the United States Environmental Protection Agency advised Joy Technologies, Inc., of the concerns. Subsequently, Joy adopted measures to prevent pollution from the PCBs.

In spite of its efforts, in 1985 Joy discovered PCB contamination at the Bluefield, West Virginia, site and on neighboring property. Joy notified the Environmental Protection Agency and negotiated an order with the Agency to remediate the contamination. Pursuant to the order, Joy eliminated the pollution at a cost of over $6,000,000.

Additionally, after the pollution was discovered, owners of property adjoining the Bluefield site filed suit against Joy for property damage, and the individual who had purchased the Bluefield site from Joy, Elwin Aliff, brought an action claiming that the PCB contamination had diminished the value of the property. Personal injury claims were also asserted by employees, former employees, and their spouses who alleged that they had suffered bodily injuries as a result of exposure to PCBs and other substances.

From 1944 until January 1, 1978, Liberty Mutual Insurance Company, a Massachusetts corporation with its principal place of business in Massachusetts, issued commercial general liability policies to Joy. The policies obligated Liberty Mutual to defend and indemnify Joy for liability claims based on personal injury or property damage arising out of an "occurrence." The policies defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The policies which Liberty Mutual issued to Joy Technologies beginning in 1972 contained an exclusion clause. The exclusion clause provided that coverage did not extend:

> [T]o bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[3]

After the various claims mentioned above arose against Joy Technologies as a result of the pollution of the Bluefield, West Virginia, facility, Liberty Mutual Insurance Company, taking the position that the exclusion clause contained in the policies issued after 1971 relieved it of liability, refused to indemnify and defend Joy as was generally required on the policies which it had issued to Joy. Joy, therefore, instituted this action for

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3. In the record of the present appeal a copy of only one policy has been submitted to this Court. That policy bore an expiration dated of October 1, 1974. In addition to the language quoted in the body of the opinion, the 1974 policy submitted to the Court contains another "Contamination or Pollution Exclusion" which has somewhat different language. The page containing that additional clause does not state an effective date or an expiration date, and it is not clear to the Court whether it was actually a part of the policy issued to Joy Technologies.

Both Joy Technologies and Liberty Mutual, in their briefs, identify the language quoted in the opinion as constituting the exclusion in issue in this case. The same language was also submitted to the West Virginia Insurance Commissioner in 1970 for his consideration and approved as hereinafter discussed.

Given the nature of the record and the representations of the parties in their briefs, this Court has based its conclusions on the clause quoted in the body of the opinion rather than on the additional "Contamination or Pollution Exclusion" submitted in the record.

breach of contract and for a declaratory judgment that it is entitled to defense and idemnity for personal injury and property liability arising out of the pollution at the Bluefield facility.

After the filing of Joy's complaint, Liberty Mutual moved for summary judgment on the claims arising after 1971 at the Bluefield, West Virginia, facility on the basis of the exclusion clause contained in the policies issued to Joy after 1971. Liberty Mutual took the position that since the pollution was not "sudden and accidental," the exclusion clause barred it of liability for the years that its policies contained the clause. In support of the motion, Liberty Mutual introduced depositions taken in an underlying personal injury and property damage case brought against Joy Technologies, Inc. The evidence from that case showed that Joy rebuilt motors used in mining equipment at the Bluefield, West Virginia, facility. The rebuilding of the motors required the emptying of PCB contaminated oil. In emptying the motors, the oil was drained into five-gallon buckets. From 1968 until 1972 or 1973, Joy's employees regularly disposed of the oil by dumping it down a storm drain outside the AC motor room at the facility, by dumping it into a gravel parking lot, or by dumping it on a hill or bank at the site. There was also evidence that PCB-contaminated oil was routinely spattered inside the building where the motors were rebuilt, that the oil was everywhere, and that there were puddles of it on the floor. At times, buckets of the oil were knocked over by forklifts and spilled. The testimony also indicated that spills occurred on a regular basis. Liberty Mutual essentially argued that this evidence showed that the pollution was not "sudden and accidental" and that coverage for it was excluded by the exclusion clause.

At the submission of briefs and oral arguments, the Circuit Court of Mercer County granted Liberty Mutual's motion for summary judgment. In so doing, the Court apparently concluded that under *Liberty Mutual Insurance Company v. Triangle Industries, Inc., Id.*,

Pennsylvania law governed the interpretation of the exclusion clause in the policies issued by Liberty Mutual in 1972 and the following years. Further, under Pennsylvania law the exclusion clause precluded coverage for claims arising out of pollution at the Bluefield facility for the period Liberty Mutual's policies contained the clause. On June 26, 1990, the circuit court issued a written order formally embodying its conclusions. It is from that order that Joy Technologies, Inc., now appeals.

On appeal, Joy Technologies first asserts that West Virginia had a more significant relationship with the parties in the case than Pennsylvania and that, under the circumstances, the circuit court should have applied the law of West Virginia rather than the law of Pennsylvania in resolving the issues presented.

The question of whether West Virginia law of Pennsylvania law applies in this case is somewhat critical since Pennsylvania has carefully examined the exclusion clause in issue in the present case and has concluded that it is unambiguous and that its clear and plain meaning is to exclude coverage for intentional pollution and for unintentional pollution resulting from a release or dispersal that occurs gradually over time. *Lower Paxton Township v. United States Fidelity & Guaranty Company,* 383 Pa.Super. 558, 557 A.2d 393 (1989). *See also, United States Fidelity & Guaranty Company v. The Korman Corp.,* 693 F.Supp. 253 (E.D.Pa. 1988), *Fisher & Porter Company v. Liberty Mutual Insurance Company,* 656 F.Supp. 132, (E.D.Pa. 1986); *Techalloy Company, Inc. v. Reliance Insurance Company,* 338 Pa. Super. 1, 487 A.2d 820 (1984).

In *Liberty Mutual Insurance Company v. Triangle Industries, Inc., Supra,* this Court addressed the question of what law should be applied in interpreting an insurance policy. In the sole syllabus in that case, the Court ruled that:

> In a case involving the interpretation of an insurance policy, made in one state to be performed in

another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state.

In adopting the rule in the *Triangle Industries* case which favors the application of the law of the forum in which formation of the contract occurs, the Court recognized that "certainly, predictability and uniformity of result" were desirable in contract negotiations and application. The Court did not, however, preclude the application of the law of another state where the other state has a more significant relationship to the transaction and the parties, or where the law of the state of formation is contrary to the public policy of the other state.

The action in the present case arises out of the expenditures of monies for remediating damage caused by pollution to property in West Virginia, and it is rather clear that the pollution arose from operations which were conducted in West Virginia and involved a facility located in West Virginia. Thus, the injury occurred in West Virginia, the instrumentality of injury was located in West Virginia, and the forum selected to try the issues was West Virginia. These factors suggest that West Virginia has had a very significant relationship to the transaction and the parties. In fact, the relationship would appear to be more substantial than that of Pennsylvania, where the contract was formed.

In a very recent case, similar to the one now before the Court, the New Jersey Superior Court, Appellate Division, concluded that contacts similar to those in the present case were alone sufficient to justify the application of the law of the forum rather than the law of the jurisdiction where the contract was entered into. In that case, *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n Ins. Co.,* No. A-1975-90T5 (N.J.Super. App.Div. Feb. 14, 1992), the New Jersey Court stated:

> We hold that New Jersey courts should interpret according to New Jersey law a pollution exclusion clause contained in a comprehensive general liability insurance policy, wherever written, which was purchased to cover an operation or activity, wherever its principal location, which generates toxic wastes that predictably come to rest in New Jersey and impose legal liabilities there on the insured. In such a case, New Jersey has the dominant and significant relationship with the parties, the transaction, and the outcome of the controversy.

slip op. at 10.

However, as indicated in *Liberty Mutual Insurance Company v. Triangle Industries, supra,* a further substantial factor which might militate against the application of the law of the state of contract formation is the public policy of the state of litigation.

Certainly, in this Court's view, an essential part of the public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that foreign corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies.

As will hereinafter be discussed, this Court believes that Liberty Mutual Insurance Company, in studied, affirmative and official communications with a regulatory authority of the State of West Virginia, prior to the institution of this action, took the position that the exclusion in question in the present case would have a meaning and effect different from that attributed to it by the State of Pennsylvania. In view of this, if this Court held that Pennsylvania law applied to the questions in issue, it would allow Liberty Mutual Insurance Company to take a position, and act in a manner, inconsistent with Liberty Mutual's studied, unambiguous, official and affirmative representations. Such, in this Court's

view, would be inconsistent with, and contrary to, the public policy of this State.

Under the circumstances, the Court believes that in spite of the general policy of the law favoring the application of the law of a state where a contract is formed, the Court, in line with the overall holding in the syllabus of *Liberty Mutual Insurance Company v. Triangle Industries, Inc., supra,* believes that the law of West Virginia, rather than the law of Pennsylvania, should govern the resolution of the questions involved in the present case.

The question which the Court must now address is what is the legal effect in West Virginia of the exclusion in question in the policies issued by Liberty Mutual Insurance Company. Before this question is addressed, however, certain observations should be made regarding the basic coverage language of the general commercial liability policy.

> The basic language of the policy states:
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. bodily injury or
> Coverage B. property damage
>
> to which this policy applies, caused by an occurrence . . .

An occurrence is defined as:

> "occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

Thus, under the basic policy issued by Liberty Mutual Insurance Company, Liberty Mutual obligated itself to defend and indemnify Joy Technologies for liability claims based on personal injury or property

damage arising out of a "occurrence," and an "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The record shows at the time Liberty Mutual adopted this standard form for the commercial general liability policy, a memorandum entitled "Summary of Broadened Coverage Under New GL Policies With Necessary Limitations to Make This Broadening Possible," was circulated internally within the company. That memorandum indicated that the policies covered liabilities including:

> Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's *waste disposal*. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of down stream industrial sites, the Donora Pa. atmospheric contamination, and the like.

In interpreting the basic policy, courts have uniformly indicated that the language generally covers claims arising from pollution. However, because of the "expected" and "intended" language, intentional pollution claims are not covered. The fact that pollution has occurred over a period of time, in the absence of an element of intention or expectation, has not been held to preclude coverage under the basic language. *See Liberty Mutual Insurance Company v. SCA Service, Inc.,* No. 88-6575 (Mass.Super., October 12, 1989); *Kipin Industries, Inc. v. American Universal Insurance Company,* 41 Ohio App.3d 228, 535 N.E.2d 334 (1987).

In the present case there were no facts elicited which demonstrate that Joy Technologies at any level intended at any time to harm property, persons, or

environment in conducting its business. In fact, certain depositions indicate that the disposal practices used by Joy, and which were ultimately found to have caused pollution, were commonly accepted in the industry at the time. When Joy acquired knowledge of possible harm from the practices, it changes those practices.

In this Court's view, the evidence adduced does not support the conclusion that Joy Technologies expected or intended to do harm when it dumped and negligently allowed the spilling of oils contains PCBs at the Bluefield site.

Given all these circumstances, the question in the present case is ultimately whether the exclusion clause contained in the policies issued by Liberty Mutual to Joy Technologies in 1972, and on later dates, effectively excluded indemnification for the damage which resulted at the Bluefield facility.

Before the exclusion clause could be legally incorporated into the commercial general liability policy in West Virginia, it was necessary that Liberty Mutual obtain the approval of the West Virginia Insurance Commissioner. Before incorporating the exclusion clause, in accordance with West Virginia law, Liberty Mutual submitted the exclusion language to the West Virginia Insurance Commissioner for his approval.

The West Virginia Insurance Commissioner held hearings to consider the proposed exclusionary language. The record shows that, in conjunction with the submissions, the Insurance Rating Board and apparently also the Mutual Insurance Rating Board, acting on behalf of their members and subscribers, including Liberty Mutual, included with their submission of the proposed exclusion language an explanation which stated:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended

> and thus are excluded by the definition of occurrence. The above exclusion [the exclusion which is in issue in the present case] clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . .

In this Court's view, the insurance industry thus represented to the State of West Virginia, acting through the West Virginia Commissioner of Insurance, that the exclusion which is in issue in the present case merely clarified the pre-existing "occurrence" clause.

This conclusion is further supported by an affidavit submitted by the former West Virginia Insurance Commissioner, who officially authorized the inclusion of the exclusion in West Virginia policies. That affidavit stated that "in preliminary submissions on the matter, the insurers represented that the proposed forms did not limit and were not intended to limit the coverage." The Commissioner also said in the affidavit that:

> The insurers stated in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so. Based upon those representations. I concluded that the pollution endorsement forms did not narrow or limit coverage and, instead, were mere clarifications of existing coverage as defined and limited by the definition of the term "occurrence." Accordingly, I approved the endorsement forms IRB 335 and MIRB MB G008 submitted respectively by the Insurance Rating Board and the Mutual Insurance Rating Bureau.

In the written order approving the pollution exclusion, the West Virginia Insurance Commissioner stated:

> (1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached:
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions;

In this Court's view, it appears clear from the foregoing discussion that the 1966 commercial general liability insurance policies, as originally issued, covered gradual bodily injury and gradual property damage resulting over a period of time from exposure to the insured's waste disposal, as was suggested by Mr. Bean in the memorandum issued in conjunction with the drafting of the policies. They, however, as originally issued, excluded damage resulting from expected and intended pollution, as indicated by the Insurance Rating Board and the Mutual Insurance Rating Board in their 1970 filings with the West Virginia State Insurance Commissioner. Further, from the filings it is clear that in seeking approval of the exclusion provision, the insurance companies did not represent that they intended to exclude any risk which was not excluded in the original policies, but that they merely intended to clarify what had been excluded in the original policies. In approving the new policy language, the West Virginia Insurance Commissioner specifically stated that the companies and rating organizations had represented that the proposed exclusions were mere clarifications of existing coverage, and in approving the language the Insurance Commissioner approved it only "to the extent that said exclusions are mere clarifications of existing coverages."

This Court has recognized that where a definite meaning has been ascribed to language used in an

insurance policy, that meaning should be given to the language by the courts. *Christopher v. United States Life Insurance Company in City of New York*, 145 W.Va. 707, 116 S.E.2d 864 (1960). In view of this, and in view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, coverage which included the injuries in the present case, this Court must conclude that the policies issued by Liberty Mutual covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.[4]

The evidence in the present case shows that Joy Technologies neither expected nor intended the pollution damage which occurred in the present case.

The judgment of the Circuit Court of Mercer County is, therefore, reversed, and this case is remanded for determination of the amount of damages to which Joy Technologies, Inc., is entitled.

Reversed and remanded with directions.

---

4. The Court notes that a number of other courts have concluded that the so-called "exclusion policy" involved in the present case merely clarified the coverage provided under the definition of insurance in the 1966 commercial general liability policy. *See Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *United States Fidelity & Guaranty Co. v. Specialty Coatings Co.*, 188 Ill.App.3d 378, 129 Ill.Dec. 306, 535 N.E.2d 1071 (1989); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J.Super. 516, 528 A.2d 76 (1987).

Supreme Court, U.S.
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No. 91-1945

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRIANGLE INDUSTRIES, INC.
A/K/A ANC HOLDINGS, INC.,
TRIANGLE PWC, INC.,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, ON BEHALF OF
IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION,

Respondents.

BRIEF IN OPPOSITION TO SUPPLEMENTAL BRIEF AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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MISCELLANEOUS:

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Restatement (Second) of Judgments § 83 (1982) 8n

2 Am. Jur. 2d Administrative Law § 496 (1962) 8n

18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4475 (1981) 8n

31 C.J.S. *Estoppel* § 117 (1964) 9n

INTRODUCTION

Respondent, Liberty Mutual Insurance Company (hereinafter "Liberty Mutual" or "Respondent"), responds to the *Supplemental Brief and Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit* ("Supplemental Brief") filed by Petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively referred to hereinafter as "Triangle" or "Petitioners"). In its Supplemental Brief, Triangle argues that, under the doctrine of collateral estoppel, a recent decision of the Supreme Court of Appeals of West Virginia in *Joy Technologies, Inc.* v. *Liberty Mutual Insurance Company*, Docket No. 88-C-96-F (June 11, 1992), in which the law of West Virginia was applied, should be preclusive in this case because Liberty Mutual was a party in both matters. Triangle would have this Court grant *certiorari* and reverse the Circuit Court's decision in this case, which applied the "pollution exclusion" under New Jersey law, because the *Joy Technologies* decision, by a West Virginia court applying West Virginia law, came to a different conclusion. This argument misconstrues both the law of collateral estoppel and the nature of the decision and the proceedings in the West Virginia case. The fact that New Jersey law differs from West Virginia law does not permit Triangle to choose the one it prefers and then argue that Liberty Mutual is "estopped" from obtaining a favorable result under the other.

The *Joy Technologies* court did not interpret the pollution exclusion. *Joy Technologies* holds that, under the specific circumstances present in that case, the public policy of West Virginia requires the application of West Virginia law to the construction of the pollution exclusion. Triangle's contention that the West Virginia court's interpretation of the policy provision under West Virginia law should apply *here*, however, ignores the fact that the Supreme Court of Appeals of West Virginia, which rendered the decision in *Joy Technologies*, is the *same court* which, in the instant case, held that the law of New Jersey, and not the law of West Virginia, must be applied to Triangle's claim. *See Liberty Mut. Ins. Co.* v. *Triangle*

Indus., Inc., 390 S.E.2d 562 (W. Va. 1990). Had the West Virginia court intended that Triangle's declaratory judgment action be controlled by the West Virginia law it set forth in *Joy Technologies*, it would have so ordered when the case was before it. As the West Virginia court did not issue such an order, that Court's decision in *Joy Technologies* does not collaterally estop Liberty Mutual from litigating the policy language at issue in *this case* nor *in any other case* in which Liberty Mutual is a party.

Moreover, Liberty Mutual is not now estopped from litigating the disputed policy language in this case because of certain statements allegedly made by insurance industry representatives to the Commissioner of Insurance of the State of West Virginia. First, the issues considered by the Insurance Commissioner are not the same issues before the Court today. The 1970 submissions concerned the limited question of whether proposed policy language was compatible with the public interest of West Virginia. The Insurance Commissioner did not make any determination of the scope of coverage provided by the pollution exclusion. As the present case centers on the application, under New Jersey law, of the exclusion to *particular* facts of the contamination at the Buckeye Landfill, the *general* proceeding before the Insurance Commissioner could not be decisive on this specific matter. Equally important, the doctrine of collateral estoppel only applies to administrative proceedings which are judicial or quasi-judicial in nature. The 1970 hearing before the West Virginia Insurance Commissioner had none of the fundamental indicia required of a judicial proceeding under case law. Thus, contrary again to Triangle's assertions, Liberty Mutual should not now be precluded from litigating the issue of policy interpretation in this case or any future case because of statements made by insurance industry representatives to the Commissioner of Insurance of the State of West Virginia.[1]

[1] For the reasons outlined in its *Opposition to Petition For a Writ of Certiorari*, Liberty Mutual believes that this case is not properly before this Court. Additionally, although the present case was decided well before *Joy Technologies*, Triangle neither argued nor properly preserved argument of the estoppel issue in the court below. This is not the forum in which to raise new arguments for the first time.

ARGUMENT

POINT 1

THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IN *JOY TECHNOLOGIES, INC.* v. *LIBERTY MUTUAL INSURANCE COMPANY* CANNOT BE A BASIS FOR COLLATERAL ESTOPPEL IN THE PRESENT CASE.

In *Joy Technologies*, the Supreme Court of Appeals of West Virginia reversed the finding of the Circuit Court of Mercer County, West Virginia, which had granted partial summary judgment to Liberty Mutual after determining that the pollution exclusion contained in Liberty Mutual's policies after 1971 barred coverage for the environmental contamination which occurred at a site owned by Joy Technologies, Inc. ("Joy"). *See Joy Technologies, Inc.* v. *Liberty Mutual Insurance Company*, Civil Action No. 88-C-96-F (June 26, 1990). Basing its opinion on *Liberty Mut. Ins. Co.* v. *Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990), the Circuit Court held that Pennsylvania law governed construction of the "pollution exclusion." The Circuit Court further granted Liberty Mutual's motion for summary judgment and held that there was no coverage for the underlying claims which arose out of extensive PCB contamination found at Joy's site. On appeal, the Supreme Court of appeals of West Virginia determined that, based on public policy considerations, West Virginia law should govern.

In rejecting application of the law of Pennsylvania, which Joy had argued for and which the Circuit Court had applied, the Supreme Court of Appeals of West Virginia acknowledged that a contrary result would have been reached under Pennsylvania law. *Joy Technologies, supra*, Docket No. 88-C-96-F, slip op. at 7, 10. Indeed, a contrary result would have been reached under the law of many other states as the interpretation

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Should the Court exercise jurisdiction over this matter, however, this brief argues that the doctrine of collateral estoppel does not apply to this case, notwithstanding Triangle's failure to properly argue or preserve this issue.

The Circuit Court further granted Liberty Mutual's motion for summary judgment and held that there was no coverage for the underlying claims which arose out of extensive PCB contamination found at Joy's site. On appeal, the Supreme Court of appeals of West Virginia determined that, based on public policy considerations, West Virginia law should govern.

In rejecting application of the law of Pennsylvania, which Joy had argued for and which the Circuit Court had applied, the Supreme Court of Appeals of West Virginia acknowledged that a contrary result would have been reached under Pennsylvania law. *Joy Technologies, supra*, Docket No. 88-C-96-F, slip op. at 7, 10. Indeed, a contrary result would have been reached under the law of many other states as the interpretation of the pollution exclusion, which Liberty Mutual argued for in *Joy Technologies*, has been adopted by numerous state and federal courts.[2]

Liberty Mutual was a party in many of these cases. Yet, because one court in one state reached a result adverse to Liberty Mutual, Triangle would have Liberty Mutual be forever precluded from litigating the issue in any forum. Such an application of collateral estoppel, as is urged on this Court by Triangle, would mean that an insurance company, *or any other party which is sued in multiple fora*, need lose only one case to be "estopped" from litigating the issue in any other state court (or indeed in any other court), regardless of how many favorable decisions it had obtained. This result is clearly at odds with the law of collateral estoppel and would result in great unfairness. Thus, the decision in *Joy Technologies* should not lead this Court to grant *certiorari* here.

[2] *See, e.g., American States Ins. Co.* v. *Maryland Casualty Co.*, 587 F.Supp. 1549 (E.D. Mich. 1984); *Techalloy Co.* v. *Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820 (Pa. 1984); *Barmet of Indiana, Inc.* v. *Security Ins. Group*, 425 N.E.2d 201 (Ind. App. 1981); *Milwaukee* v. *Allied Smelting Corp.*, 117 Wis. 2d 377, 344 N.W.2d 523 (Ct. App. 1983); *Pepper's Steel & Alloys, Inc.* v. *United States Fidelity & Guar. Co.*, 668 F.Supp. 1541 (S.D. Fla. 1987); *American Motorists Ins. Co.* v. *General Host Corp.*, 667 F.Supp. 1423 (D.Kan. 1987); *International Minerals & Chem. Corp.* v. *Liberty Mut. Ins. Co.*, 168 Ill.App.3d 361, 522 N.E.2d 758, *appeal denied*, 122 Ill.2d 576, 530 N.E.2d 246 (1988); *Borden, Inc.* v. *Affiliated FM Ins. Co.*, 682 F.Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 493 U.S. 817 (1989).

POINT 2

THE DOCTRINE OF COLLATERAL ESTOPPEL, AS ANNOUNCED IN *PARKLANE HOSIERY CO.* v. *SHORE*, IS INAPPLICABLE TO THE PRESENT CASE.

Triangle also argues in Point 1 of its Supplemental Brief that, in light of *Joy Technologies*, Liberty Mutual is collaterally estopped from litigating the policy language at issue in *this* case because of this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). (Supplemental Brief, at pp. 2-4) Triangle's reliance upon *Parklane Hosiery* is misplaced.

Parklane Hosiery held that collateral estoppel precludes a defendant from relitigating *facts* which had been resolved adversely to it in a prior proceeding with another party. *Parklane Hosiery, supra*, 439 U.S. at 326, 99 S.Ct. at 648, 58 L.Ed.2d at 559. *Joy Technologies* involved an issue of law, *i.e.*, the construction of an insurance policy provision in light of a choice of law question. As no determinations of *fact* were made in *Joy Technologies*, *Parklane Hosiery* is inapplicable.

Parklane Hosiery also held that the application of collateral estoppel would be inappropriate where the decision that is the basis of the estoppel is *inconsistent* with one or more previous decisions in favor of the defendant. *Parklane Hosiery, supra*, 439 U.S. at 322, 330, 99 S.Ct. at 651, 58 L.Ed.2d at 552. *See also General Dynamics Corp.* v. *American Tel. & Tel. Co.*, 650 F.Supp. 1274, 1285 (N.D. Ill. 1986), *cert. granted, amended*, 658 F.Supp. 417 (N.D. Ill. 1987). This is the very situation which is present in the case before the Court. The conclusion of the West Virginia court concerning the pollution exclusion is inconsistent with the prior decisions of numerous other state and federal courts on the same legal issue.[3] While

[3] *See, e.g., Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F.Supp. 1317 (E.D. Mich. 1988); *International Minerals & Chem. Corp.* v. *Liberty Mut. Ins. Co.*, 168 Ill.App.3d 361, 522 N.E.2d 758 (Ill. Ct. App. 1st Dist. 1988), *appeal denied*, 122 Ill.2d 576, 530 N.E.2d 246 (1988); *Lower Paxton Township* v. *United*

certain courts have, after applying their own law to varying facts, reached results adverse to Liberty Mutual, Triangle's assertion that Liberty Mutual "should now be bound by those [adverse] adjudications" (Supplemental Brief, at p. 9), is as disingenuous as it is wrong. To estop Liberty Mutual from litigating the pollution exclusion after it loses one case, despite winning numerous other cases, misapplies the doctrine of collateral estoppel. Collateral estoppel should not apply each and every time that there is a difference of opinion among courts of different jurisdictions with respect to the construction of a term in an insurance policy. It is entirely possible — indeed common — for different courts in different states to apply *their own bodies of law* and *have different opinions* as to the meaning of identical contractual or statutory language.[4] In such cases, as is necessary to invoke the doctrine of collateral estoppel, the issues cannot be "identical" if the governing law is not the same. Accordingly, even if the *Joy Technologies* court *had* decided the meaning of the pollution exclusion under West Virginia law, Liberty Mutual should not now be estopped from arguing (and a court from deciding) that it means something else under New Jersey law.

States Fidelity & Guar. Co., 383 Pa. Super. 558, 557 A.2d 393 (Pa. Sup. 1989), *appeal denied*, 562 A.2d 653 (Pa. 1989); *Lumbermens Mut. Casualty Co.* v. *Belleville Indus., Inc.*, 555 N.E.2d 568, 407 Mass. 675 (Mass. 1990); *Technicon Elec. Corp.* v. *American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d (N.Y. App.Div. 1988), *aff'd*, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989); *The Upjohn Co.* v. *New Hampshire Ins. Co.*, 438 Mich. 197 (1991).

[4] For example, in *Just* v. *Land Reclamation, Ltd.*, 155 Wis.2d 737, 456 N.W.2d 570 (Wis. 1990), the Supreme Court of Wisconsin concluded that, in the context of an environmental insurance case, the word "sudden" in the pollution exclusion was "reasonably susceptible to different meanings" and was, therefore, *ambiguous*. *Id.* at 571. Confronted with another environmental insurance case, the Massachusetts Supreme Judicial Court held in *Lumbermens Mut. Casualty Co.* v. *Belleville Indus., Inc.*, 407 Mass. 675, 555 N.E.2d 568 (Mass. 1990), that the language in the pollution exclusion was *unambiguous*.

POINT 3

THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT APPLY TO THE 1970 SUBMISSIONS MADE TO THE COMMISSIONER OF INSURANCE OF THE STATE OF WEST VIRGINIA.

Triangle argues in Point 2 of its Supplemental Brief that Liberty Mutual is collaterally estopped from advocating a position regarding the interpretation of the "sudden and accidental" exception to the pollution exclusion because of certain statements allegedly made by certain insurance industry representatives to the West Virginia Insurance Commissioner ("Insurance Commissioner") in 1970 (the "1970 submissions"). (Supplemental Brief, at pp. 5-10) This estoppel argument is, presumably, derived from *Joy Technologies*, in which the Supreme Court of Appeals of West Virginia held that, because of the 1970 submissions, the law of West Virginia, rather than the law of Pennsylvania, should apply to the pollution exclusion.

In considering whether collateral estoppel should be applied in a given case, however, a court must first determine whether a given issue has been *actually litigated* by the parties in the earlier suit. *Parklane Hosiery*, *supra*, 439 U.S. at 326-31, 99 S.Ct. at 649-52, 58 L.Ed.2d at 559-62; *General Dynamics*, *supra*, 650 F.Supp. at 1281. The issues considered by the Insurance Commissioner are not the same issues before the Court today. The 1970 submissions concerned the limited question of whether proposed policy language regarding the pollution exclusion was compatible with the public interest of West Virginia. In contrast, however, the present case centers on the application, *i.e.*, *the scope*, of the language of the exclusion to the *particular* facts of the contamination at the Buckeye Landfill. Accordingly, the *general* proceeding before the Insurance Commissioner could not be decisive on this specific matter.

Collateral estoppel should not be applied to quasi-judicial determinations of administrative agencies such as the 1970

proceeding before the Insurance Commissioner. While this Court in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), recognized that the doctrine of collateral estoppel may be applied to quasi-judicial determinations of administrative agencies, subsequent interpretations of *Utah Construction* have held the doctrine of collateral estoppel should not be indiscriminately applied to all determinations by administrative agencies. Rather, agency findings may be given preclusive effect only where the agency acts in a *judicial capacity* and the party against whom estoppel will be applied had a full and fair opportunity to present its case to the agency.[5] *General Dynamics, supra*, 650 F.Supp. at 1285 n.10.

The 1970 proceeding before the Insurance Commissioner did not involve any of the essential characteristics of a judicial type hearing. *See Mellon-Stuart Co.* v. *Hall*, 359 S.E.2d 124, 133 (W.Va. 1987). There were no requirements that the participants testify under oath or that formal rules of pleading and evidence be observed. W. Va. Ins. Code, § 33-2-13. There was no requirement that the Insurance Commissioner make a detailed record of the proceedings. Indeed, none of the fundamental indicia, necessary *to confer "judicial character" upon an administrative proceeding*, was followed in the hearing before the West Virginia Insurance Commissioner. Thus, as there is no basis for finding that the Insurance Commissioner had judicial powers, collateral estoppel cannot be applied to the outcome of the 1970 proceedings.

Further, collateral estoppel is a highly technical doctrine that applies only in severely limited circumstances. It is designed to prevent a party from relitigating ultimate issues of *fact* that already have been resolved against that party. *See Teledyne Indus., Inc.* v. *N.L.R.B.*, 911 F.2d 1214, 1220 (6th Cir. 1990); *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598

[5] *See also Mellon-Stuart Co.* v. *Hall*, 359 S.E.2d 124, 133 (W.Va. 1987); *Pacific Elec. Contractors Ass'n.* v. *A.A. Electric*, 583 F.Supp. 472, 477 (D.Haw. 1984); *Restatement (Second) of Judgments* § 83 (1982); K. Davis *Administrative Law* § 21:1 (2d ed. 1983); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4475 (1981); 2 Am. Jur. 2d *Administrative Law* § 496 (1962).

(6th Cir. 1982). The doctrine of collateral estoppel is not meant to apply to matters of law.[6] *McNunis* v. *Zukosky*, 141 W.Va. 145, 89 S.E.2d 354, 358 (W.Va. App. Ct. 1955). As the 1970 submissions to the Insurance Commissioner consisted solely of the *opinions* of various insurance industry spokespeople on the scope of coverage, and did not constitute points of law, the doctrine of collateral estoppel is inapplicable to 1970 submissions quoted by Triangle.

Moreover, the statements which Triangle cites are, in essence, mischaracterizations of, and selective quotations from, the 1970 submissions. (Supplemental Brief, pp. 5-10). For example, Triangle quotes in its Supplemental Brief an excerpt taken from a portion of a May 11, 1970 submission by the Mutual Insurance Rating Bureau ("MIRB"), a trade group to which Liberty Mutual belonged. (Supplemental Brief, at p. 6) Despite the fact that the excerpt quoted by Triangle clearly states that the purpose of the pollution exclusion was to "*avoid* any question of intent," Triangle implies that the exclusion bars coverage only when the pollution harm is *intended* by the insured. (Supplemental Brief, at p. 6) This argument flies in the face of both logic and *the language of the submission itself*. Statements taken out of context and misapplied should not serve as the basis for collateral estoppel.

Finally, the doctrine of collateral estoppel also requires that the party against whom it is invoked have taken successive, *inconsistent* positions in *successive suits*. The position Liberty Mutual has taken in this case is *consistent* with the position taken by various insurance industry representatives in 1970. For example, both Liberty Mutual and the MIRB believed that

[6] As other courts have explained: "Usually the rule is applicable only to bar the assumption of inconsistent positions as to factual matters and is not to be applied where a party assumes inconsistent positions as to contentions of law as applied to a given state of facts. Consequently a change of position with respect to a pure matter of law ordinarily will not work an estoppel. . . ." *Kansas City* v. *Martin*, 391 S.W.2d 608, 616 (Mo. Ct. App. 1965). *See also U.S.* v. *Irvin*, 787 F.2d 1506 (11th Cir. (Ga.) 1986); *Frye* v. *United Steelworkers of America*, 767 F.2d 1216 (7th Cir. (Ind.) 1985); 31 C.J.S. *Estoppel* § 117, at 613 (1964); *Pittston Co.* v. *O'Hara*, 191 Va. 886, 63 S.E.2d 34, *appeal dismissed sub nom.*, *Winn* v. *Pittston Co.*, 342 U.S. 803 (1951); *Grodsky* v. *Sipe*, 30 F.Supp. 656, 660 (Ill. 1940) (one "cannot be estopped as to admissions as to the law").

pollution which resulted from ongoing releases, rather than a sudden event, was excluded under the "occurrence" definition. Thus, Liberty Mutual's position has been *consistent* with that taken by the various insurance industry representatives in 1970 and Triangle should not be allowed to collaterally estop Liberty Mutual through the selected use and misrepresentation of insurance industry submissions.

CONCLUSION.

Triangle seeks to collaterally estop Liberty Mutual collaterally from litigating the policy language at issue in this case because of the *Joy Technologies* decision. However, based on the foregoing discussion, the offensive use of the collateral estoppel doctrine by Triangle would be inappropriate and would result in substantial injustice to Liberty Mutual. Liberty Mutual, therefore, respectfully moves this Court to deny the *Petition for Writ of Certiorari to the United States Supreme Court* filed by Triangle in this action.

Respectfully submitted,

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